83-801

Office-Supreme Court, U.S.
FILED
NOV 14 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PICKANDS MATHER & CO., AS MANAGING AGENT FOR ERIE MINING CO.,
Petitioner,

v.

COMMISSIONER OF REVENUE OF THE STATE OF MINNESOTA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

E. BARRETT PRETTYMAN, JR.*
PAUL J. LARKIN, JR.
HOGAN & HARTSON
(a partnership including professional corporations)
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4685

EDWARD T. FRIDE
PAUL J. LOKKEN
HANFT, FRIDE, O'BRIEN & HARRIES, P.A.
1200 Alworth Building
Duluth, Minnesota 55802
(218) 722-4766
Counsel for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the Commerce Clause of the Constitution of the United States, and the Due Process Clause of the Fourteenth Amendment, forbid the State of Minnesota from apportioning to itself the entire income generated from interstate sales of subsurface minerals by a firm engaged in the mining and production of minerals for sale entirely to companies located in other States.

2. Whether this Court's decision in *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444 (1924)—that the Contract Clause of the federal Constitution (Art. I, § 10, cl. 1) bars only state *legislative* and not *judicial* actions destroying vested contract rights—should be modified with respect to contracts between the State and private parties in the light of more recent interpretations of constitutional obligations and limitations.

PARTIES

Pickands Mather & Co., as Managing Agent for Erie Mining Company, was the respondent before the Minnesota Supreme Court. The Minnesota Commissioner of Revenue and the Range Municipalities and Civic Association were relators before that Court.*

---

* Pickands-Mather is a wholly-owned subsidiary of Moore McCormick Resources, Inc. Erie Mining Company is owned by its shareholders in the following proportions: Bethlehem Steel Corporation (45%); Youngstown Sheet & Tube Co. (35%); Interlake, Inc. (10%); and Stelco Coal Co. (10%).

The following companies are wholly-owned subsidiaries of Pickands Mather: Crawford Coal Company; Northwest Iron Co., Ltd.; Pickands Mather & Co. International; Pickands Erie Corporation; Robert Coal Company; Scotts Branch Co.; Syracuse Mining Company; Turner Elkhorn Mining Company; The Ashtabula & Buffalo Dock Company; Carroll County Coal Company; Detour Dock Company; Erie Dock Company; Lake State Land Company; Masabi Radio Corporation; Peninsula Land Corporation; Seigneley Resources, Inc.; Study Butte Mining Company; Taconite Contracting Corporation; Toledo Coke, Inc.

Pickands Mather possesses the following ownership interest in the following mines: Leslie Mine (20%); McInnes Mine (20%); Savage River Mines (36.2%); Scotts Branch Mine (40.8%); Wabush Mines (5.2%).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	(i)
PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT	4
STAGES AT WHICH THE FEDERAL QUESTIONS WERE RAISED AND PRESERVED	12
REASONS FOR GRANTING THE PETITION	12
CONCLUSION	24
APPENDICES	1a
APPENDIX A—Order of the Supreme Court of Minnesota Denying Petitioner's Petition for Rehearing and Motion for Remand	1a
APPENDIX B—Decision of the Supreme Court of Minnesota	2a
APPENDIX C—Findings of Fact, Conclusions of Law, Order for Judgment and Memorandum of the Minnesota Tax Court	19a
APPENDIX D—Statement of the Purposes and Effect of the Taconite Amendment by Minnesota Attorney General Walter F. Mondale (July 6, 1964)	81a

TABLE OF AUTHORITIES

Cases: Page

Aloha Airlines, Inc. v. *Hawaii Director of Taxation*, 52 U.S.L.W. 4001 (U.S. Nov. 1, 1983) 16
ASARCO, Inc. v. *Idaho State Tax Comm'n*, 102 S. Ct. 3103 (1982) 15
Bolling v. *Sharpe*, 347 U.S. 497 (1954) 19
Bouie v. *City of Columbia*, 378 U.S. 347 (1964) 19
Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U.S. 673 (1930) 19
Cantwell v. *Connecticut*, 310 U.S. 296 (1940) 19
Commonwealth Edision Co. v. *Montana*, 453 U.S. 609 (1981) 14
Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977) 17
Container Corp. v. *Franchise Tax Board*, 103 S. Ct. 2933 (1983) ..... *passim*
Edwards v. *South Carolina*, 372 U.S. 229 (1963) 19
Everson v. *Board of Education*, 330 U.S. 1 (1947) 19
Exxon Corp. v. *Wisconsin Dept. of Revenue*, 447 U.S. 207 (1980) 16
Frank v. *Mangum*, 237 U.S. 309 (1915) 19
Gitlow v. *New York*, 268 U.S. 652 (1925) 19
Lynch v. *United States*, 292 U.S. 571 (1934) 20
Lyons v. *Spaeth*, 220 Minn. 563, 20 N.W.2d 481 (1945) 23
Marks v. *United States*, 430 U.S. 188 (1977) 19
Martin v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) 20
Minnesota v. *Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) 19
Mobil Oil Corp. v. *Commissioner of Taxes*, 445 U.S. 425 (1980) 15, 16
Nixon v. *Fitzgerald*, 457 U.S. 731 (1982) 20
Olympia Brewing Co. v. *Commissioner of Revenue*, 326 N.W.2d 642 (Minn. 1982) 22
Reserve Mining Co. v. *State*, 310 N.W.2d 487 (Minn. 1981) 10
Thurston Motor Lines, Inc. v. *Jordan K. Rand, Ltd.*, 103 S. Ct. 1343 (1983) (*per curiam*) 12

TABLE OF AUTHORITIES—Continued

	Page
Tidal Oil Co. v. *Flanagan*, 263 U.S. 444 (1924)	*passim*
United States Trust Co. v. *New Jersey*, 431 U.S. 1 (1977)	20, 21
Vachon v. *New Hampshire*, 414 U.S. 478 (1974) (*per curiam*)	12
Constitutional Provisions:	
U.S. Const. Art. I. § 8, cl. 3	2
Art. I. § 10, cl. 1	(i), 2
Amend. XIX	2
Minn. Const. Art. X, § 6	4, 9
Statutory Provisions:	
Minn. Stat. Ann. § 3.21	22
§ 298.01 (1983)	8
§ 298.03(1)-(6) (1983)	7
§ 298.40	2, 8
§ 298.40 subd. 1(b) (3)	11
1971 Minn. Gen. Laws Ex. Sess. C.31, Art. 4	10
1974 Minn. Gen. Laws C.556	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-

PICKANDS MATHER & CO., AS MANAGING AGENT FOR ERIE MINING CO.,

Petitioner,

v.

COMMISSIONER OF REVENUE OF THE STATE OF MINNESOTA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

Petitioner Pickands Mather & Co., as Managing Agent for Erie Mining Co., prays that a writ of certiorari issue to review the judgment of the Supreme Court of Minnesota in this matter.

OPINIONS BELOW

The Findings of Fact, Conclusions of Law, Order for Judgment and Memorandum of the Minnesota Tax Court (Appendix C, App. 19a-81a) are not officially reported. The decision of the Minnesota Supreme Court, from which certiorari is sought (Appendix B, App. 2a-18a) is reported at 334 N.W.2d 155 (1983). The Order of the Minnesota Supreme Court denying petitioner's Petition

for Rehearing and Motion for Remand (Appendix A, App. 1a) is not officially reported.

JURISDICTION

The Minnesota Supreme Court's decision and judgment herein was rendered on May 13, 1983 (App. 2a). The Minnesota Supreme Court's Order denying petitioner's timely Petition for Rehearing and Motion for Remand was entered on August 16, 1983 (App. 1a). The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause of the Constitution (Art. I, § 8, cl. 3) provides, in part:

> The Congress shall have Power * * * to regulate Commerce * * * among the several States * * *.

The Contract Clause of the Constitution (Art. I, § 10, cl. 1) provides:

> No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *.

The Due Process Clause of the Fourteenth Amendment provides:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law.

Section 298.40 of Minnesota Statutes (1982) provides:

> Subsection 1. The combined occupation, royalty, and excise taxes imposed upon or required to be paid with respect to the mining, production, or beneficiation of taconite or semi-taconite by any person or corporation engaged in such mining, production, or beneficiation, shall not be increased so as to exceed the greater of (a) the amount which would be payable if such taxes were computed under the laws in existence as of July 1, 1963, or (b) the amount

which would be payable if such person or corporation were taxed with respect to such mining, production, or beneficiation under the income, franchise, and excise tax laws generally applicable to manufacturing corporations transacting business within the state, as such laws may be enacted or amended from time to time, except that for the purpose of the computation under this clause (b), (1) income shall be apportioned to Minnesota in the manner which may be otherwise specified by law; (2) operating losses shall be carried forward from one taxable year to another only to the extent which may be otherwise permitted by law; and (3) the market value of the taconite or semi-taconite, or the beneficiated product thereof, at the point where the beneficiation processes within this state are completed may be treated by law as gross receipts for the purpose of determining gross income from the business of mining, producing, or beneficiating taconite or semi-taconite, provided that if such market value is so used, to the extent that federal income taxes are deductible in computing taxes of manufacturing corporations generally, deductions shall be computed and allowed as if such taxes had been computed, assessed, and paid under the federal income tax laws with the market value of the taconite or semi-taconite or the beneficiated product thereof constituting the gross receipts for the purpose of determining gross income from the business of mining, producing, or beneficiating taconite or semi-taconite.

Subd. 2. Taxes imposed upon the mining or quarrying of taconite or semi-taconite and upon the production of iron ore concentrates therefrom, which are in lieu of a tax on real or personal property, shall not be considered to be occupation, royalty, or excise taxes within the meaning of this section.

Subd. 3. For the purpose of this section "taconite" and "semi-taconite" shall have the meaning given to them by laws in existence at the time of the adop-

tion of this section. [Laws of Minnesota 1963, Chapter 81]

Article X, § 6 of the Minnesota Constitution ("the Taconite Amendment") provides, in relevant part:

> Notwithstanding any other provision of this constitution, Laws of Minnesota 1963, Chapter 81, relating to the taxation of taconite and semi-taconite, and facilities for the mining, production, and beneficiation thereof shall not be repealed, modified or amended, nor shall any laws in conflict therewith be valid for a period of twenty-five years after the adoption of this amendment; * * *

STATEMENT

Erie Mining Company ("Erie") is a Minnesota corporation engaged in the business of mining taconite ore and producing taconite pellets within Minnesota for delivery to steel manufacturers located outside of the State.[1] Erie

---

[1] Erie did not begin acquiring taconite reserves until after passage of the taconite production tax in 1941. In 1942, Erie set up a laboratory in Hibbing, Minnesota, to conduct further experimentation in taconite production, and built a 200,000 ton pilot plant at Aurora, Minnesota, in the early 1950's. Also at that time, Erie began contemplating the construction and operation of a commercial plant with a production capacity of 7.5 million tons of pellets annually. Tremendous difficulties still remained, however, including the obtainment of financing for the huge capital outlay required for the project, which was estimated to be around $354,000,000.

One of the greatest obstacles was the treatment Erie and its shareholders would receive for federal income tax purposes. The shareholders determined that the project could be feasibly undertaken only if Erie was treated for federal income tax purposes as a "cost company", *i.e.*, only if it was disregarded as a corporate taxpaying entity for *federal* income tax purposes, and the shareholders taxed for those purposes as if they were conducting the operation on a joint venture basis. The Internal Revenue Service granted this request of Erie and its shareholders by its ruling letter dated March 11, 1953, and the Closing Agreement which was attached to said letter. Throughout its history, however, Erie has always been treated as a separate entity for *all state* tax purposes.

either owns or has a leasehold interest in the property from which it mines taconite ore, and owns the severed taconite ore, processed taconite pellets, and beneficiating equipment used in processing taconite. All of this ore, property, and equipment is located within the State of Minnesota. By contrast, none of Erie's shareholders, who purchase all of Erie's taconite pellets, is located within the State. No steelmaking facilities exist within the State capable of using these pellets. The first and only beneficial use of these taconite pellets is as a raw material for the production of steel and pig iron in blast furnaces outside of Minnesota.

Since its incorporation in 1940, Erie has been a central figure in the development of the Minnesota taconite industry, which provides the background against which the issues in this case must be viewed.

A. Background.

Minnesota held a near-monopoly upon the natural iron ores used by the Nation's steel industry for the production of pig iron and steel from the turn of the century until the 1940's. By the early 1940's, however, it became apparent that this state of affairs would not be everlasting. Canvassing the situation at that time, the Minnesota legislature foresaw a substantial risk to the State's economy from the gradual depletion of the State's natural ore resources. Concerned that the inevitable exhaustion of the State's supply of iron ore would lead to a deterioration of the economy in the Iron Range regions in which iron ore was found, the legislature sought to offset that depletion by encouraging production of the State's vast but still-undeveloped reserves of taconite.

However, Minnesota's tax system, as it related to the mining industry, proved to be a severe impediment to the formation of a viable taconite industry in Minnesota. It was widely recognized that the ad valorem and occu-

pation taxes historically imposed upon the natural ore industry were greatly excessive and discriminatory when compared to the same or comparable taxes paid by other manufacturing industries. Potential taconite producers let it be known that they would not be willing to make the tremendous capital investments required to construct the taconite projects and provide the jobs so urgently sought unless they could be assured in some way that their operations would receive a more equitable tax treatment in the future.

To stimulate taconite production, the legislature in 1941 lessened the tax burden on companies engaged in taconite production, substituting a production tax on taconite for the otherwise-applicable (and more costly) ad valorem tax imposed upon the production of natural ores within the State (App. 21a-22a). Enactment of this production tax appeared to hold some promise for the State's interest in developing a taconite production industry: within ten years both Erie Mining Co. and Reserve Mining Co. had developed taconite production plants and were in the process of producing taconite pellets for use in iron and steel production (*id.* 22a). At the same time, Minnesota's near-monopoly upon iron ore production remained strong throughout the 1940's and 1950's (*id.* 30a).

But by the early 1960's the State's natural ore industry began to experience a far more rapid decline than had been predicted twenty years beforehand and for entirely different reasons. The deteriorating position of the Minnesota iron ore industry was due not to the exhaustion of the iron ore reserves, but to competitive factors such as the expansion of the world supply of iron ore, mining in other States, the development of substitutes for iron and steel, and the substitution of the technologically-superior taconite for iron ore in steel production (*id.* 28a-32a). As a result, the predicted consequences of the demise of the iron ore industry gradually began to ripen and had a

devastating effect on the economy of the Mesabi Range communities in which iron ore was found (*id.* 33a-34a). The state legislature concluded that a dramatic expansion of the taconite industry was the greatest hope for the economic salvation of the Range (*id.*).

The legislature also recognized, however, that the private market was not likely automatically to respond to the increasing demand for taconite, and thereby shore up the State's deteriorating economy. Private investors were unlikely to invest the huge sums necessary for augmenting the State's nascent taconite industry because of the discrimination suffered by mining companies under the existing tax system. Under Minnesota law, mining companies had historically been subject to an "occupation" tax rather than an "income" tax, and had been taxed at a rate twice that applicable to non-mining companies in the State (*id.* 26a).[2] Numerous legislative studies con-

---

[2] Mining companies in Minnesota had historically been subject to an occupation rather than an income tax. There are material differences between the two, principally with respect to items that may be consider ' as deductions. Many expenses allowed as deductions for income tax purposes are not allowed as deductions for occupation tax purposes, with the result being that the occupation tax is far more burdensome than the income tax.

The occupation tax is also computed differently from the income tax. The occupation tax is imposed against the value of mined or produced taconite measured where the ore is brought to the surface (known as "the value at the mouth of the mine") less certain statutory deductions relating to the costs of mining the ore (App. 25a-26a; see also Minn. Stat. §§ 298.03(1)-(6)). The method historically employed by the Minnesota Commissioner of Revenue to determine the value at the mouth of the mine is as follows.

The Commissioner subtracts from the published Lake Erie price (representing the actual fair market value of the ore delivered at lower Lake Erie ports) certain expenses necessarily incurred beyond the value at the mouth of the mine that would be reflected in the published Lake Erie price. These expenses, known as "non-statutory deductions," chiefly consist of items such as allowances for stockpiling and loading costs, beneficiation costs, transportation

firmed that the discretionary nature of the state tax system was a prime cause of the declining market share that Minnesota held in the world taconite market (*id.* 26a-32a),[3] and proposed a modification of the tax laws as the remedy for this problem (*id.* 33a-34a, 65a-66a). The legislature responded to these recommendations by capping the tax burden on taconite producers in the form of the legislation at issue in this case.

B. Taconite Amendment.

In order to rectify the discriminatory effect of the existing tax system with respect to mining companies and to assure potential investors in the taconite industry of fair treatment, the Minnesota legislature in 1963 adopted Minn. Stat. § 298.40 to equalize the tax treatment of the taconite industry (pages 2-3, *supra*). Section 298.40 in essence established a two-part formula for limiting, inter alia, the state occupation tax. Under this section, a taconite company's occupation taxes could not exceed the greater of (a) the occupation taxes payable under the

---

and marketing costs, and certain other miscellaneous expenses (*id.* 26a). After the Commissioner calculates these non-statutory deductions, he takes the statutory deductions noted above to arrive at the taxable value of the ore. This value is taxed at the occupation tax rate (15% under Minn. Stat. 298.01) to determine the gross tax. Certain credits are then applied against the gross tax to arrive at the net amount of tax due, which the taxpayer must pay (*id.*).

[3] Principally because of the unfavorable tax climate which had been applied to the natural ores, there was a great fear that the expansion of the taconite industry so strongly coveted by Minnesota was occurring elsewhere. One union official expressed his extreme concern in this regard as follows:

> There is no question but what taconite or semi-taconite and high grade ore concentrates are replacing Minnesota iron ores in the making of steel. Minnesota produced these processes but the records show other states and other countries have taken advantage of these processes and are gradually moving Minnesota out of the market. [Exhibit 81 before the Tax Court.]

occupation tax laws in existence as of the effective date of Section 298.40 (*i.e.*, 1963), or (b) the taxes paid by non-mining companies, which were subject to an income rather than an occupation tax. In this way, taconite mining companies were assured that they would not be subject to more onerous taxation than that levied upon non-mining companies in the State.

Further to assure taconite investors that the legislaure would not thereafter reinstate the discriminatory tax system in place prior to the enactment of Section 298.40, the Minnesota legislature proposed, and the people of the State at a general election overwhelmingly approved, an amendment to the state constitution forbidding the legislature from repealing or modifying Section 298.40.[4] This amendment, known as the Taconite Amendment, fixed for a period of twenty-five years the benefits to taconite mining and production firms (like Erie) provided by Section 298.40 as an inducement to investment in the Minnesota taconite industry.

---

[4] The proposed Taconite Amendment, which was required to be ratified by the people of the State, received wide support. Among those prominent individuals supporting passage of the amendment were Governor Rolvaag, former-Governor Elmer Anderson, Oscar R. Knutson, Chief Justice of the Minnesota Supreme Court, the late Senator Hubert Humphrey, then-Attorney General Walter Mondale, Doctor Charles Mayo, and a host of other business, political, labor, and religious leaders. It was endorsed by literally hundreds of groups representing almost every facet of Minnesota's social and cultural life, including both major political parties, professional associations, chambers of commerce, fraternal organizations, social clubs, educational groups, business groups, cities, county boards, and many others. Because of this broad-based support, the Taconite Amendment was overwhelmingly approved by a legislative vote of 177 to 13 and subsequently by more than 80% of the voters at the general election held in November 1964, and is now incorporated into the Minnesota Constitution as Article X, Section 6.

It is manifest that the Taconite Amendment was proposed by the legislature and approved by the people as an inducement to taconite producers to locate in Minnesota. As the Tax Court found in holding that the Commissioners had erred in assessing Erie $1.6 million more than Erie would be taxed if taxed as a non-mining Minnesota manufacturer: "[t]he purpose of said legislation and Taconite Amendment was to provide incentives, assurances, and legal commitments to encourage investors to build and operate new taconite production facilities and to continue and expand existing taconite facilities in Minnesota" (App. 36a). In so doing, the Taconite Amendment, as the Minnesota Supreme Court has itself recognized (*Reserve Mining Co.* v. *State*, 310 N.W.2d 487, 493-494 (1981)), created a contract between the State and taconite mining companies, such as Erie, for purposes of the Contract Clause of the federal Constitution (Art. I, § 10, cl. 1).[5]

The issues presented by this petition arise out of the State's efforts to avoid the binding effect of this contract.

C. The Proceedings Below.

In determining Erie's occupation tax liability for the year 1974, respondent Commissioner of Revenue refused to apply the Taconite Amendment. Thus, none of Erie's net income from its taconite sales for that year were apportioned to transactions in interstate commerce but were, instead, treated as if those transactions took place wholly intrastate.

---

[5] Following the adoption of the Taconite Amendment and during the initial establishment of Erie's operations, no significant statutory changes increasing the amount of occupation and royalty taxes payable by the taconite industry were made until 1971. In 1971, however, the legislature increased the rate of both the occupation tax and the royalty tax on taconite from 12 percent to 15 percent (Laws of Minn. 1971, Ex. Sess. c. 31, art. 4). In 1974, occupation taxes on taconite were further increased through limitation of the deductions for interest on plant investment and shrinkage (Laws of Minn. 1974, c. 556).

On appeal, the state Tax Court rejected the Commissioner's contention, concluding that, under Section 298.40, Erie was entitled to the same apportionment of its income as is applicable to a non-mining company taxed under the general income laws (App. 73a-77a). The Tax Court further concluded that Erie's transfer of taconite to its shareholders must be treated as sales.[6]

On the Commissioner's appeal, the Minnesota Supreme Court reversed. The court concluded, first, that Section 298.40 did not require apportionment. The court interpreted that section simply to permit the state legislature thereafter to adopt an apportionment formula for taconite companies, rather than to incorporate the existing apportionment formula unless and until the state legislature so acted (*id.* 10a-11a). Contrary to the Tax Court's conclusion, the court hypothesized that the legislature may have intended to deny companies such as Erie apportionment *because* of their status as cost companies (*id.* 12a). Since apportionment is available only where a company sells tangible, personal property delivered or shipped to an out-of-state purchaser, the apportionment statute was inapplicable to cost companies which, the court claimed, did not "sell" goods and, instead, simply transferred goods at cost from one entity to another (*id.* 13a).

---

[6] This was so because Section 298.40 subd. 1(b)(3) attributed gross receipts to Erie, a cost company under the federal tax laws, which, by definition, could not have gross receipts in excess of production costs (which are deductible) without receiving revenue from sales (App. 78a). That being so, the only sales possible in this case were sales with a destination outside of Minnesota because there were no smelting facilities within the State (*id.*). The contrary conclusion, the Tax Court wrote, was illogical because it would deny taconite cost companies—the only type of taconite mining companies operating commercially in Minnesota when the Taconite Amendment was adopted—the benefit of the apportionment to which other taconite companies commencing operation after 1964 and all non-mining companies would be entitled (*id.* at 78a-79a).

STAGES AT WHICH THE FEDERAL QUESTIONS WERE RAISED AND PRESERVED

Petitioner raised its due process argument at its first opportunity when it appealed to the Tax Court the adverse ruling by the Commissioner of Revenue. Petitioner did not thereafter argue either portion of Question 1 before the Minnesota Supreme Court in the appeal taken against it by the Commissioner, although it did so in its Petition for Rehearing and Motion for Remand. It submits that this Court has jurisdiction to correct the plain error committed by that court in respect to Question 1. See, *e.g.*, *Vachon* v. *New Hampshire*, 414 U.S. 478 (1974) (*per curiam*). Petitioner could not have raised the second question presented by this petition in the state courts, because those courts could not have overruled a decision of this Court. See, *e.g.*, *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 103 S. Ct. 1343, 1344 (1983) (*per curiam*).

REASONS FOR GRANTING THE PETITION

The decision of the Minnesota Supreme Court nullified the State's solemn contract with instate taconite mining companies set forth in the state constitution. The contract guaranteed that these companies' investment of literally hundreds of millions of dollars would not be subjected to the discriminatory tax treatment such companies had suffered prior to the Taconite Amendment.[7] That amend-

---

[7] A more precise quantification of the Tax Court's figures (App. 36a-39a) follows:

MINNESOTA'S TACONITE PLANTS

Taconite Facilities in Operation Prior to the Passage of the Taconite Amendment in 1964	*Annual Production Capacity*	*Estimated Investment*	*Employment at Rated Capacity*
Reserve Mining Company	6,600,000 tons	$ 190,000,000	2,500
Second Project	3,300,000 tons	120,000,000	
Erie Mining Company	7,500,000 tons	300,000,000	2,400
Pilotac (U.S. Steel)	750,000 tons	50,000,000	325
Total to 1964	**18,050,000 tons**	**$ 660,000,000**	**5,225**

ment, passed to shore up a failing state economy by assuring potential and existing investors that a set, two-part formula would thereafter be employed to cap the occupation taxes levied upon mining companies in lieu of income taxes, created a binding contract within the meaning of the Contract Clause of the federal Constitu-

Taconite Industry Growth, Phase Following Taconite Amendment: 1964-1974	*Annual Production Capacity*	*Estimated Investment*	*Employment at Rated Capacity*
Reserve Expansion	1,000,000 tons	$ 50,000,000	500
Erie Mining Expansion	3,500,000 tons	50,000,000	350
Minntac (U.S. Steel)	11,750,000 tons	225,000,000	3,200
Eveleth Taconite	2,300,000 tons	45,000,000	546
Butler Taconite	2,650,000 tons	66,000,000	600
National Steel Pellet	2,600,000 tons	90,000,000	600
Total Added 1964-1974	**23,800,000 tons**	**$ 526,000,000**	**5,796**
Taconite Industry Growth, Phase Beginning in 1974			
Inland Steel Mining Co.	2,600,000 tons	$ 150,000,000	570
Hibbing Taconite Co.	8,100,000 tons	360,000,000	1,250
Minntac Expansion	6,000,000 tons	200,000,000	1,000
Eveleth Expansion	3,600,000 tons	315,000,000	854
National Steel Pellet Exp.	3,200,000 tons	150,000,000	400
Total Added Since 1974	**23,500,000 tons**	**$1,175,000,000**	**4,074**
Company-by-Company			
Reserve Mining Company	10,800,000 tons	$ 360,000,000	3,000
Erie Mining Company	11,000,000 tons	350,000,000	2,750
Minntac (U.S. Steel)	18,500,000 tons	475,000,000	4,200
Eveleth Mines	5,900,000 tons	360,000,000	1,400
Butler Taconite	2,650,000 tons	66,000,000	600
National Steel Pellet	5,800,000 tons	240,000,000	1,000
Inland Steel Mining Co.	2,600,000 tons	150,000,000	570
Hibbing Taconite Co.	8,100,000 tons	360,000,000	1,250
Total	**65,350,000 tons**	**$2,361,000,000**	**15,095**

tion (Art. I. § 10, cl. 1) between the State and taconite mining and production companies, including petitioner (see page 10, *supra*). In so doing, the Taconite Amendment basically equalized the tax positions of the taconite and other mining companies operating throughout the State, which have historically been subject to an occupation tax, with the tax position of the State's nonmining companies, which are subject to an income tax.

The tortured construction of the tax formula incorporated into the Taconite Amendment by the court below not only produces a result antithetical to the purpose for which the Taconite Amendment was adopted, but it also singles out a small, but clearly identifiable, class of businesses, operating, by necessity, in interstate commerce, for discriminatory treatment solely because of the interstate character of their business. Under two allied lines of decisions of this Court, culminating in *Container Corp.* v. *Franchise Tax Board*, 103 S. Ct. 2933 (1983), on the one hand, and *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981), on the other, blatant discrimination of this type imposed on businesses engaged in interstate commerce cannot pass constitutional muster. Reliance upon Erie's cost company status to characterize its interstate transactions as mere "transfers" rather than "sales" of goods cannot avoid the command of the Due Process and Commerce Clauses in this regard. Even under the "transfer" theory, the State cannot tax value earned beyond its borders, much less do so simply *because* some of that value is earned outside of Minnesota.

But if the Minnesota Supreme Court's legerdemain is somehow sufficient to escape the commands of the Due Process and Commerce Clauses, then that result calls into question the rationale underlying this Court's ruling in *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444 (1924), that only the state legislature, and not the state judiciary, can violate the Contract Clause of the federal Constitution. For the evils at which the Contract Clause were

addressed can surely come about through judicial invalidation of one of the State's covenants as easily as by legislative repudiation, and the fact that the State refuses to abide by its bargains through the one route rather than through the other scarcely offers any succor to a party who has invested millions of dollars based upon the State's contract *simpliciter*. The decision below manifests the dangers to which parties such as petitioner can be subject if the formalistic rule employed in *Tidal Oil Co.* is permitted to shelter the State's broken promises, and justifies a re-examination of this area in light of the Court's intervening precedents questioning the foundation for that rule.

1. The Due Process Clause imposes a limit upon a State's authority to tax income of a business operating in interstate commerce that is derived from transactions taking place beyond the state line. As the Court noted only two Terms ago, "a State may not tax value earned outside its borders." *ASARCO, Inc.* v. *Idaho State Tax Comm'n*, 102 S. Ct. 3103, 3109 (1982). See also *Container Corp.*, 103 S. Ct. at 2939. The Commerce Clause imposes a like obligation (see, *e.g.*, *Container Corp.*, 103 S. Ct. at 2940), but also requires that the state tax "not result in discrimination against interstate or foreign commerce." *Id.* at 2943. See also *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 444 (1980). In this case, the Minnesota Supreme Court, by refusing to treat any part of the income generated by Erie's transfer in interstate commerce of its taconite pellets to out-of-state parties as value earned outside of the State's borders, plainly failed to heed the commands of both Clauses.

(a) The central flaw in the decision below is the court's failure to recognize that the interstate transfer of taconite, the event upon which the occupation tax is levied (see note 2, *supra*), generates income for Erie only because of the interstate character of the transfer. Erie's mining and beneficiation facilities are located

within Minnesota, as are (of course) the properties from which the taconite ore is extracted. By contrast, all of the facilities in which taconite can be used are *outside* of the State. Hence, whether this transfer may technically be characterized as a "sale" under state law—a conclusion which, of course, does not bind this Court as a matter of federal constitutional analysis (see, *e.g.*, *Container Corp.*, 103 S. Ct. at 2945-46, and cases cited therein; cf. *Aloha Airlines, Inc.* v. *Hawaii Director of Taxation*, 52 U.S.L.W. 4001, 4003 (U.S. Nov. 1, 1983))—does not wholly determine the inquiry under the Due Process Clause. For even where the corporation upon whom the tax is levied can legitimately be treated as a "unitary business" operating across state lines—which, for these purposes, is the only tenable reading of the Minnesota court's reliance upon the "cost company" character of Erie's operations—the State is nonetheless bound fairly to apportion the entire net income of the corporation with respect to its intrastate and *interstate* activities. See, *e.g.*, *Container Corp.*, 103 S. Ct. at 2942; *Exxon Corp.* v. *Wisconsin Dep't of Revenue*, 447 U.S. 207, 219 (1980); *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. at 436-437. And if Erie is to be treated as an interstate corporation because of its cost company status, then at least *some* of its income must be attributable to the value received by its non-Minnesota shareholders by virtue of their sales and expected sales following the processing of taconite into pig iron or steel.

Hence, if the Minnesota Supreme Court were correct that this transfer is not a sale, then it must follow that the statutory basis must simply represent the income attributed to one stage in the process of producing steel. That steel is manufactured by Erie's shareholders, all of whom are non-Minnesota corporations, thereby requiring at least *some* apportionment to reflect the value earned outside of Minnesota. See, *e.g.*, *Container Corp.*, 103

S. Ct. at 2939; *ASARCO*, 102 S. Ct. at 3109. The court below, however, did not even begin to make this inquiry.

(b) On the other hand, if, as we believe, the transactions at issue clearly *do* constitute a sale of taconite, then the Minnesota Supreme Court's failure to apportion the resulting proceeds with respect to their intrastate and interstate character not only ignores the Court's decisions in the line of cases culminating in last Term's *Container Corp.* decision, but also fails to respect the *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), and *Commonwealth Edison Co.* line of cases. For, while *Complete Auto Transit* and *Commonwealth Edison* have eliminated the ancient proposition that a State may not at all tax goods that have entered into the stream of interstate commerce, the very narrowest proposition which these cases have established is that a State may not tax goods in that stream without first fairly apportioning the intrastate and interstate facets of those goods in a manner that does not discriminate against interstate commerce. See *Commonwealth Edison*, 453 U.S. at 617; *Complete Auto Transit*, 430 U.S. at 279.

Yet the Minnesota Supreme Court, under the mantle of statutory construction, has clearly denied to taconite mining companies, alone of all the companies, mining and otherwise, operating within the State, any apportionment. And taconite companies are denied apportionment notwithstanding the undisputed fact that the only first use of taconite is one that can be made outside of Minnesota. For not only are there no smelting plants within the State capable of using taconite in pig iron and steel production —a fact which was universally recognized at the time the Taconite Amendment and Section 298.40 were adopted, and which is undeniable even today—but, as the Minnesota Supreme Court itself recognized (App. 4a), all of

Erie's taconite production is necessarily purchased by its non-Minnesota shareholders.

That being so, the Minnesota Supreme Court's interpretation, which denies apportionment to a readily identifiable class of business which can operate *only* in interstate commerce, so plainly violates the Commerce Clause as interpreted in *Complete Auto Transit* and *Commonwealth Edison* as to demonstrate the invalidity of its conclusion that these transfers are not sales. That court's failure to give any, much less serious, consideration to the discrimination against the interstate nature of Erie's transactions, however, cannot serve to avoid the requirements of this Court's Commerce Clause precedents.

2. In *Tidal Oil Co.*, this Court gave a literal interpretation to the Contract Clause in ruling that its language that "No State shall * * * *pass any* * * * *Law* impairing the Obligation of Contracts * * " (emphasis added) confined its scope to legislative, and not judicial, actions impairing vested contract rights. 263 U.S. at 451. The Court has not re-examined that doctrine in any depth since the 1920's. The instant case squarely presents a vehicle for such a re-examination.

(a) Subsequent events demonstrate that the judicial exemption will no longer stand analysis. Since *Tidal Oil Co.*, the Court has recognized that the Framers did not intend their particular syntax forever to freeze the development of federal constitutional law into the four corners of their chosen language. For instance, the First Amendment clearly provides that *only* Congress "shall *make no law* * * * abridging the freedom of speech * * *" (emphasis added). Yet less than a year after *Tidal Oil Co.* was handed down, the Court ruled that parties were entitled to protection from State as well as federal nullification of the right to "freedom of speech," notwith-

standing the fact that the Framers had limited the scope of the First Amendment to actions by *Congress* alone. See *Gitlow* v. *New York*, 268 U.S. 652, 666 (1925).[8] Similarly, the Court had clearly ruled by 1923 that the Ex Post Facto Clause of the Constitution was applicable only to legislative, not judicial, actions. See *Frank* v. *Mangum*, 237 U.S. 309, 344 (1915). But it later acknowledged that this distinction was constitutionally unsound. It ruled that the Due Process Clause of the Fifth and Fourteenth Amendments forbade retroactive *judicial* expansion of the scope of a criminal statute that would violate the Ex Post Facto Clause if accomplished by a legislature. See *Marks* v. *United States*, 430 U.S. 188, 191-192 (1977); *Bouie* v. *City of Columbia*, 378 U.S. 347, 353-354 (1964). The Court in *Bouie* and *Marks* rejected as unsound the rationale relied upon in *Frank*—which constituted the same rationale relied upon in *Tidal Oil Co.* (compare *Frank*, 237 U.S. at 344, with *Tidal Oil Co.*, 263 U.S. at 451), as this Court recognized in *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 680-681 n.7 (1930). This Court's decisions in *Bouie* and *Marks* therefore demonstrate the unsound analysis employed in *Tidal Oil Co.*

Moreover, the decision in *Tidal Oil Co.* cannot be defended upon the ground that the Framers' concerns are inapplicable to judicial lawmaking. In light of the now-indisputable proposition that the States are "free to allocate the lawmaking function to whatever branch of state government they may choose" (*Minnesota* v. *Clover Leaf*

---

[8] See also *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) (First Amendment Free Exercise Clause applicable to the States); *Everson* v. *Board of Education*, 330 U.S. 1 (1947) (First Amendment Establishment Clause applicable to the States); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963) (First Amendment right peacefully to assemble and petition government for redress of grievances applicable to States); cf. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954) (Equal Protection principles of Fourteenth Amendment applicable to federal government under Fifth Amendment Due Process Clause).

Creamery Co., 449 U.S. 456, 461 n.6 (1981)), it cannot be gainsaid that the state judiciary may engage in the very same lawmaking function that *Tidal Oil Co.* apparently assumed would be performed by the state legislature alone. Hence, whether this Court's decision in *Tidal Oil Co.* is seen as resting upon the plain language of the Contract Clause or the assumption that its language was addressed to a problem capable of arising in only one fashion, that basis is no longer tenable in light of the Court's contemporary precedents.

There is simply no justification for permitting the state judiciary to shield the state treasury from the State's voluntarily-assumed obligations to private investors. For, if the state legislature may not sacrifice a party's contractual rights to satisfy its own interests (see *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977)), then surely the state judiciary, which is equally bound to honor the federal Constitution (see *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816)), surely stands on no stronger constitutional footing when it elects to do so. It can hardly be claimed that the authority to repudiate a State's covenants is an indispensable element to a sovereign state judiciary, since neither the federal government (see *Lynch* v. *United States*, 292 U.S. 571 (1934)) nor the President himself (cf. *Nixon* v. *Fitzgerald*, 457 U.S. 731, 753-754 (1982)) may repudiate the contracts of the United States with impunity. The very existence of the Contract Clause demonstrates the Framers' insistence that the States must keep their word, and there is surely no legitimate interpretation of the purposes of the Contract Clause which would recognize that a limit upon the state legislative power is less intrusive than a comparable limit upon the state judicial power. To hold otherwise would be to carve out a safe harbor for the state judiciary for this one matter alone, a result plainly at odds with the purpose for which the Contract Clause was adopted.

(b) The decision below also highlights the dangerous consequences of a pedantic approach to federal constitutional analysis. The harm befalling investors such as petitioner, who have pumped hundreds of millions of dollars into a deteriorating state economy because of the State's promise of equal treatment, is scarcely any the less severe simply because the state Supreme Court chose to ignore or abrogate a state constitutional amendment rather than rely upon the legislature itself explicitly to disavow its promise. For, as the opinion of the state Tax Court makes clear and the opinion of the state Supreme Court nowhere denies, the legislature and people of Minnesota adopted Section 298.40 and the Taconite Amendment precisely to assure taconite production companies that they would be taxed no more harshly than nonmining companies similarly operating in interstate commerce. Because the Contract Clause would surely invalidate any effort by the legislature to rob petitioner of the benefits of its bargain with the State (see *United States Trust Co.*, 431 U.S. at 26), only a construction of the Contract Clause that is oblivious to the role state courts play in "pass[ing] * * * Law[s]" would invalidate the one while approving the other. We respectfully urge the Court to rule that the syntax of the Clause does not exert such hegemony over its meaning as to permit the States to violate its plain command simply by shifting responsibility from one branch of state government to another.

Here, the Minnesota Supreme Court readily acknowledged that a contract exists, one in which every word was carefully scrutinized before $1.8 billion was invested in reliance thereon. The objective clearly advanced and adopted in the Taconite Amendment was to assure parity between mining and non-mining corporations during its 25-year limitation. This was not simply surmise by the taconite mining companies. Public officials, including the Attorney General of the State, formally assured the vot-

ers prior to passage of the Taconite Amendment that this was precisely what the amendment would accomplish (see App. D, 81a-82a).[9]

Nine years into the 25-year limitation period, the Minnesota legislature decided, again in the State's self-interest,[10] to amend the apportionment formula so as to encourage investment in Minnesota by corporations carrying on business within and without the State. The formula authorized Minnesota manufacturing corporations to apportion a part of their net income derived from sales made outside Minnesota. In concluding that petitioner is not entitled to use the same apportionment formula, the Minnesota Supreme Court destroyed any concept of the continuing parity envisioned by the drafters of the contract. Parity means just that—a comparable level, up or down. Yet the court below denied petitioner the very parity the Taconite Amendment guaranteed, in a manner no less unlawful than if the legislature itself had done so.

We urge the Court so to rule.

3. The historical record in this case presents the Court with an invaluable opportunity to reconsider its ruling in *Tidal Oil Co.* That record clearly shows that the Taconite Amendment was specifically intended to equalize the treatment of mining and nonmining companies, and the decision below, which ignores that purpose, therefore

---

[9] The Attorney General's statement of the purpose and effect of the Taconite Amendment was, by statutory requirement, distributed throughout Minnesota, widely published in every legal newspaper, and, in conspicuous poster form, prominently displayed in every polling place on election day. See Minn. Stat. § 3.21.

[10] The Minnesota Supreme Court has noted: "Tax avoidance aside, the legislature also had apparent concerns about uniformity with other states to make Minnesota more attractive to business." *Olympia Brewing Co.* v. *Commissioner of Revenue*, 326 N.W.2d 642, 645 (1982).

epitomizes the problems that can result from the *Tidal Oil Co.* decision.

Furthermore, this case is far more than just a test case for the numerous taconite companies in Minnesota (see App. 3a). The adoption of economic guarantees, encouraging in-state investment, as part of a State's own constitution is a development worth preserving.[11] If the state judiciary may erase the State's covenants by fiat, private investors will surely be unwilling hereafter to invest the millions of dollars Erie and similar companies have done in Minnesota in the gamble that the state judiciary will honor the bargain that the state legislature is constitutionally forbidden to breach.

Finally, it cannot be denied that the rule of *Tidal Oil Co.* establishes an anomaly in contemporary constitutional analysis. In no other area of current constitutional doctrine are the decisions of the state judiciary shielded from federal constitutional scrutiny. The decision below therefore offers the Court the opportunity to re-examine this antediluvian principle and thereby eliminate the unjustified favoritism accorded the state judiciary by *Tidal Oil Co.*

---

[11] Referring to a prior constitutional amendment relating to mining, a unanimous Minnesota Supreme Court observed that "[t]he utilization of these ores was of tremendous importance to the prosperity of the state and in time of war to the safety of the nation. To encourage their utilization was a legitimate public purpose." *Lyons* v. *Spaeth*, 220 Minn. 563, 570, 20 N.W.2d 481, 485 (1945).

CONCLUSION

The difficult competitive and economic conditions confronting taconite companies today are no less compelling than those existing at the time of the adoption of the Taconite Amendment. Minnesota's taconite companies are operating at less than one-third of capacity, and employment is similarly reduced. The Minnesota Supreme Court should not be permitted to eviscerate the intent of the Amendment and thereby add new burdens to the Iron Range region's struggle for survival.

The petition should be granted.

Respectfully submitted,

E. BARRETT PRETTYMAN, JR.*
PAUL J. LARKIN, JR.
HOGAN & HARTSON
(a partnership including
professional corporations)
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4685

EDWARD T. FRIDE
PAUL J. LOKKEN
HANFT, FRIDE, O'BRIEN &
HARRIES, P.A.
1200 Alworth Building
Duluth, Minnesota 55802
(218) 722-4766
Counsel for Petitioner

* Counsel of Record

Office-Supreme Court, U.S.
FILED
NOV 14 1983
ALEXANDER L. STEVAS,
CLERK

83-801

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PICKANDS MATHER & CO., AS MANAGING AGENT FOR ERIE MINING CO.,
Petitioner,

v.

COMMISSIONER OF REVENUE OF THE STATE OF MINNESOTA, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

E. BARRETT PRETTYMAN, JR.*
PAUL J. LARKIN, JR.
HOGAN & HARTSON
(a partnership including professional corporations)
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4685

EDWARD T. FRIDE
PAUL J. LOKKEN
HANFT, FRIDE, O'BRIEN & HARRIES, P.A.
1200 Alworth Building
Duluth, Minnesota 55802
(218) 722-4766

Counsel for Petitioner

*Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
APPENDIX A—Order of the Supreme Court of Minnesota Denying Petitioner's Petition for Rehearing and Remand	1a
APPENDIX B—Decision of the Supreme Court of Minnesota	2a
APPENDIX C—Findings of Fact, Conclusions of Law, Order for Judgment and Memorandum of the Minnesota Tax Court	19a
APPENDIX D—Statement of the Purposes and Effect of the Taconite Amendment by Minnesota Attorney General Walter F. Mondale (July 6, 1964)	81a

APPENDIX A

STATE OF MINNESOTA
IN SUPREME COURT

C5-82-94 and C7-82-95

PICKANDS MATHER & CO., as MANAGING AGENT FOR ERIE MINING COMPANY,
Respondent,

vs.

THE COMMISSIONER OF REVENUE,
Relator (C5-82-94),

and

RANGE MUNICIPALITIES and CIVIC ASSOCIATION,
Relator (C7-82-95).

ORDER

This court, having considered en banc the petition for rehearing in the above entitled cause,

IT IS ORDERED that the petition for rehearing be and hereby is denied and stay vacated.

IT IS FURTHER ORDERED that relators are not allowed attorney fees on this petition pursuant to Minn. R. Civ. App. P. 140.

Dated: August 16, 1983

BY THE COURT:

/s/ John E. Simonett
JOHN E. SIMONETT
Associate Justice

[Filed Aug. 16, 1983]

APPENDIX B

TAX COURT

Simonett, J.

C5-82-94 and C7-82-95

Endorsed
Filed May 13, 1983
Wayne Tschimperle, Clerk
Minnesota Supreme Court

PICKANDS MATHER & CO., as MANAGING AGENT FOR ERIE MINING COMPANY,
Respondent,

vs.

THE COMMISSIONER OF REVENUE,
Relator (C5-82-94),

and

RANGE MUNICIPALITIES and CIVIC ASSOCIATION,
Relator (C7-82-95).

SYLLABUS

1. In computing the statutory limitation of its aggregate occupation, royalty and excise tax liability under Minn. Stat. § 298.40, subd. 1(b) (1982), a taconite mining company is not entitled to apportionment of its hypothetical income.

2. The additional production taxes imposed on respondent taconite mining company under Minn. Stat. § 298.241 (1976) for the years 1971 through 1974 are deductible by the taconite company for the purpose of determining its occupation tax liability.

Reversed on the aggregate tax limitation issue, and affirmed on the additional production tax deductibility issue.

Heard, considered and decided by the court en banc.

OPINION

SIMONETT, Justice.

This is an appeal by the Commissioner of Revenue from a decision of the Tax Court holding that the aggregate occupation, royalty and excise tax assessed against a taconite mining company for the years 1971 through 1974 exceeded the limits imposed by Minn. Stat. § 298.40 (1982) and further holding that an additional production tax imposed under Minn. Stat. § 298.241 (1976) was a deductible item in calculating the occupation tax. We reverse the first holding and affirm the second.

Respondent is Pickands Mather & Co., managing agent for Erie Mining Company. Pickands Mather and other taconite producers each appealed to the Tax Court their aggregate occupation, royalty and excise taxes assessed for the years from 1971 to the present, alleging that the level of these taxes exceeds that permitted by Minn. Stat. § 298.40 (1982). The producers also appealed to the Tax Court the Commissioner's disallowance, in computing the occupation tax for 1971 through 1976, of a deduction for additional production taxes imposed on production in these years. The parties agreed to try Pickands Mather's appeals first for the years 1971-74 as representative of the other appeals on the legal questions raised. The Range Municipalities and Civic Association was permitted by stipulation to intervene. On November 25, 1981, the Tax Court issued findings of fact, conclusions of law and order for judgment, holding in favor of Pickands Mather in all respects. By certiorari, the Commissioner of Revenue, as relator, brings the Tax Court's decision to us for review.

Erie Mining Company is a Minnesota corporation which mines and produces taconite ore within Minnesota. It is owned by its shareholders in the following proportions: Bethlehem Steel Corporation (45%); Youngstown Sheet and Tube Co. (35%); Interlake, Inc. (10%); and Stelco Coal Co. (10%). For 1974 Erie was a "cost company" within the meaning of Rev. Rul. 56-542 (since revoked by Rev. Rul. 77-1) of the Internal Revenue Service. Under the terms of a letter agreement, required by the IRS for an entity to operate as a cost company, these shareholders provide in proportion to their percentage of ownership all funds to Erie necessary for the mining company to operate. In exchange, the shareholders (all out-of-state manufacturers) receive the ore produced by Erie in proportion to their ownership interests. This cost company status is directly relevant only for federal income tax purposes, allowing Erie to operate as a nontaxable entity at the federal level.

The parties agree that all of Erie's taconite ore production facilities, property and employees are within Minnesota. Once produced, all of the ore is distributed to its shareholders out of state. Most of the ore is transported from Erie's plant over the company railroad to Erie's loading facilities at Taconite Harbor, Minnesota. Three of the four shareholders contract with independent private ore carriers to transport the pellets to the shareholders' facilities in other states, while the fourth shareholder, Bethlehem Steel Corporation, uses both independent carriers and its own vessels to transport the taconite ore to its facilities. A minor portion of the ore pellets are transported out of state by common carrier. In all cases, however, the taconite ore is delivered to its shareholders at destinations outside of Minnesota.

The principal Minnesota taxes imposed upon the taconite industry are the occupation tax, Minn. Stat. § 298.01, subd. 2 (1982); royalty tax, section 299.01-.14 (1982); and production taxes, sections 298.24 (1982) and 298.241

(1976), and, until its repeal in 1978, the employer's excise tax, section 290.031. Taconite companies in Minnesota are exempt from state income tax, section 290.05, since the occupation tax is in lieu of an income tax. They are also exempt from property taxes, section 298.25, on their taconite operations, since the production taxes are in lieu of a property tax.

The occupation taxes assessed by the Commissioner for the taxable years 1971-74 are the taxes in dispute here. The issues posed primarily involve questions of statutory construction rather than an inquiry into the constitutionality of the pertinent statutes.

The Limitation on the Occupation Tax

With respect to occupation taxes, the issue is:

> Whether Erie is entitled to apportionment in determining the statutory limitation of its occupation tax liability under Minn. Stat. § 298.40, subd. 1(b) (1982). And, if so, whether Erie is entitled to a refund of occupation tax overpayments, or instead, a credit against occupation taxes otherwise payable under Minn. Stat. § 298.09, subd. 4 (1982).

The occupation tax is a tax imposed upon every person engaged in the business of mining or producing taconite in Minnesota. Section 298.01, subd. 2 (1982). The taconite is currently taxed at 15% of its value. The taxable value of the taconite is the ore's value at the place where the ore is brought to the earth's surface (mouth-of-the-mine value) and is determined by the Commissioner through administrative computations. Section 298.03 (1982). The Commissioner has historically determined the "mouth-of-the-mine" taxable value by beginning with the published Lake Erie sale price of the taconite and then working backwards, deducting the costs incurred after the ore has been brought to the surface, *i.e.*, beneficiation and transportation expenses, to determine the

mouth-of-the-mine value. These deductions are called nonstatutory deductions.

Other deductions (such as the cost of extracting the ore) are made as provided by section 298.03 (1982) to arrive at the taxable value of the taconite. The effective tax rate is applied to the net figure after all deductions to determine a company's occupation tax liability. Although section 298.01, subd. 2 (1982), imposes a 15% tax rate, that rate is reduced by the labor credit to a current effective rate of 6.75% pursuant to section 298.02 (1982).

Further, the occupation tax liability is subject to the statutory limitations imposed under section 298.40 (1982). It is the construction of this statute that is central to this appeal. This statutory limitation is made secure by the Taconite Amendment to the Minnesota Constitution, art. 10, § 6, which prohibits any amendment, modification or repeal of section 298.40 for 25 years, *i.e.*, until 1989. The statutory limitation was enacted in 1963 and the constitutional amendment the following year. The Taconite Amendment was enacted to ensure investors in the taconite industry of fair tax treatment and thereby to encourage taconite development. Further, it appears that the legislature had in mind the contention of the mining industry that historically occupation taxes on the mining companies had exceeded income taxes on other kinds of corporations. In *Reserve Mining Co. v. State*, 310 N.W.2d 487, 494 (Minn. 1981), we noted that the Taconite Amendment created a contract between the taconite producers and the State of Minnesota and observed that "[w]hen the people of this state make a bargain, mining companies as well as the least of us have a right to expect that the bargain will be kept."

It is Erie's contention, adopted by the Tax Court, that the occupation tax assessed by the Commissioner for 1974 exceeds the tax ceiling imposed by section 298.40. Thus the questions for this court are what limitation does section 298.40 impose and has that limit been exceeded.

Section 298.40 is set out in full below.[1] Essentially it

[1] Minn. Stat. § 298.40 (1982) provides:

Subdivision 1. The combined occupation, royalty, and excise taxes imposed upon or required to be paid with respect to the mining, production, or beneficiation of taconite or semi-taconite by any person or corporation engaged in such mining, production, or beneficiation, shall not be increased so as to exceed the greater of (a) the amount which would be payable if such taxes were computed under the laws in existence as of July 1, 1963, or (b) the amount which would be payable if such person or corporation were taxed with respect to such mining, production, or beneficiation under the income, franchise, and excise tax laws generally applicable to manufacturing corporations transacting business within the state, as such laws may be enacted or amended from time to time, except that for the purpose of the computation under this clause (b), (1) income shall be apportioned to Minnesota in the manner which may be otherwise specified by law; (2) operating losses shall be carried forward from one taxable year to another only to the extent which may be otherwise permitted by law; and (3) the market value of the taconite or semi-taconite, or the beneficiated product thereof, at the point where the beneficiation processes within this state are completed may be treated by law as gross receipts for the purpose of determining gross income from the business of mining, producing, or beneficiating taconite or semi-taconite, provided that if such market value is so used, to the extent that federal income taxes are deductible in computing taxes of manufacturing corporations generally, deductions shall be computed and allowed as if such taxes had been computed, assessed, and paid under the federal income tax laws with the market value of the taconite or semi-taconite or the beneficiated product thereof constituting the gross receipts for the purpose of determining gross income from the business of mining, producing, or beneficiating taconite or semi-taconite.

Subd. 2. Taxes imposed upon the mining or quarrying of taconite or semi-taconite and upon the production of iron ore concentrates therefrom, which are in lieu of a tax on real or personal property, shall not be considered to be occupation, royalty, or excise taxes within the meaning of this section.

Subd. 3. For the purpose of this section "taconite" and "semi-taconite" shall have the meaning given to them by laws in existence at the time of the adoption of this section.

provides that the occupation, royalty and excise taxes imposed on Erie shall not exceed the greater of two limitations:

> Clause (a)—the amount Erie would pay if its tax were computed under the laws as they existed on July 1, 1963; or
>
> Clause (b)—the amount Erie would pay if Erie were taxed under the income, franchise and excise tax laws generally applicable to manufacturing corporations transacting business within Minnesota, but subject to specified exceptions.

Since both parties concede that Erie's 1974 occupation, royalty and excise tax liability exceeds the clause (a) limitation, the question here is whether it exceeds the greater limitation set by clause (b). Clause (b), it is observed, does not freeze Erie's tax liability, but allows the limitation to be whatever the income, franchise and excise taxes generally applicable to manufacturing corporations may be from time to time, subject to specified exceptions. Since Erie does not pay income taxes, it is necessary under clause (b) to compute hypothetically what Erie's income taxes would be were it taxed like other corporations.

Erie's occupation tax liability for 1974 under the laws applicable in that year (if a deduction were permitted for the section 298.241 production tax, to be discussed later) would be $2,732,600. To this figure must be added Erie's royalty and excise tax liabilities for 1974 of $1,144,274, for a total occupation, excise and royalty tax liability of $3,876,874. If the Commissioner's interpretation of clause (b) is adopted, all of Erie's 1974 net income will be apportioned to Minnesota and the $3,876,874 actual figure computed for 1974 will not exceed the hypothetical tax. If, however, Erie's and the Tax Court's interpretation of clause (b) is followed, only 30% of Erie's net income would be apportioned to

Minnesota and thus subject, hypothetically, to the 12% state corporate income tax imposed on manufacturing companies. This would result in a hypothetical total income, franchise and excise tax liability for Erie of $2,233,880, which is *less* than the occupation, royalty and excise taxes actually imposed. Under Erie's interpretation of clause (b), its actual occupation, royalty and excise tax liability for 1974 exceeds the statutory limitation by $1,642,994. If this latter contention is affirmed by this court, then Erie is entitled to either a credit or a refund in this amount.[2]

In other words, the issue is whether Erie is to be allowed income apportionment. Whether Erie has paid too much tax because its payment exceeds the hypothetical tax limitation of clause (b) depends on whether, in computing the hypothetical tax liability, the Commissioner must apportion Erie's income in the same manner that other Minnesota manufacturing companies apportion their income.

The formula for income apportionment for Minnesota manufacturing companies doing business partly within and partly without Minnesota is set out in Minn. Stat. §§ 290.19 and 290.17, subd. 2(4) (1982). If this apportionment formula is applicable to computing Erie's hypothetical income tax under the clause (b) limitation, then only 30% of Erie's hypothetical income is allocated to Minnesota, thus lowering the clause (b) limitation, thereby reducing the amount of occupation tax liability the Commissioner can assess against Erie. The Commissioner argues that the apportionment formula does not apply because: (1) an examination of clause (b) of section 298.40 shows that the apportionment formula of section 290.19 was not intended to apply to taconite

---

[2] Throughout the balance of this opinion, we will, for simplicity, refer to Erie's occupation, royalty and excise tax liability as amounts of the occupation tax liability, since the royalty and excise taxes are not in dispute here.

producers; and (2) even if section 290.19 were intended to apply, an examination of section 290.19 shows that it is not applicable to Erie. The Tax Court rejected both of the Commissioner's contentions. We disagree with the Tax Court.

Minn. Stat. § 298.40, subd. 1, is, unfortunately, not free of ambiguity. Clause (b) provides in part that Erie's taxes are to be limited to:

> the amount which would be payable if such person or corporation were taxed with respect to such mining, production, or beneficiation under the income, franchise, and excise tax laws generally applicable to manufacturing corporations transacting business within the state, as such laws may be enacted or amended from time to time * * *.

Clause (b), however, does not end there; if it did, we would have no problem. It goes on to provide:

> except that for the purpose of the computation under this clause (b), (1) income shall be apportioned to Minnesota in the manner which may be otherwise specified by law * * *.

What is the significance of this proviso? Erie takes the position the phrase means that the apportionment formula of section 290.19 is to be used in computing a taconite company's hypothetical income; in other words, section 290.19 is, in effect, incorporated by reference into clause (b) of section 298.40. We do not agree.

Were the apportionment formula of section 290.19 meant to apply, the proviso would not have been inserted. The preceding language of clause (b) plainly says that taconite companies are to be taxed in the same manner as other manufacturing companies, and other manufacturing companies are subject to section 290.19. In other words, if the proviso were intended to include section 290.19, it is unnecessary and redundant. There has to be a different reason or purpose for the proviso. Erie suggests, alternatively, that the phrase at least means that section

290.19 should apply until such time as the legislature specifies a different apportionment formula. This alternative interpretation, however, is also subject to the infirmity that the phrase was unnecessary because section 290.19 would apply without it; if the legislature intended section 290.19 to apply until the legislature enacted a different statutory formula, we think the legislature would have said so directly, instead of making an exception to the apportionment formula of general application and stating that income would be apportioned in the manner "which may be otherwise specified by law."

We conclude the only reasonable interpretation of the proviso is that the taconite company's hypothetical income is to be apportioned otherwise than as specified in section 290.19. The proviso language must be read in conjunction with the language that precedes it. Clause (b) says that the taconite company's occupation tax shall not exceed its hypothetical income tax liability *except* that in computing the hypothetical tax limitation, income shall be apportioned in the manner which may be *otherwise* specified by law.[3] In other words, the legislature did not intend the apportionment formula generally applicable to manufacturing companies to be used, but it reserved the right to specify an apportionment formula at such time in the future as it deemed appropriate. Since the legislature has not seen fit for the years in question to enact a specific apportionment statute for the clause (b) computation, no apportionment is available to Erie.

---

[3] A difference in income apportionment is not the only difference in treatment of taconite companies from other manufacturing companies in the computation of the clause (b) hypothetical income tax liabiilty. Clause (b) also establishes imputed gross receipts from Minnesota operations rather than relying on income from actual sales, as well as an imputed deduction for federal income taxes rather than relying on actual federal taxes paid.

The legislature may have excluded the apportionment formula of section 290.19 in the clause (b) computation because the formula is not applicable to a "cost company." At the time section 298.40 was enacted in 1963, the only taconite companies operating in this state were cost companies.[4] The apportionment formula of section 290.19 is available only to those corporations doing business partly within and partly without Minnesota. Minn. Stat. § 290.17, subd. 2(4) (1982), defines a trade or business located in Minnesota as doing business partly within and partly without the state "if tangible personal

---

[4] At such time as a for-profit taconite mining company might begin operations in the state, the legislature might then exercise its reservation under the proviso of clause (b) to enact a hypothetical statutory income apportionment formula. Richard Hastings, testifying as a representative of the taconite mining industry before the Senate Committee on Taxes and Tax Laws on March 14, 1963, when the bill for section 298.40 was being discussed, had this to say:

> [The bill] provides that the tax shall not exceed the greater of either the present tax, the present tax, the present occupation and royalty tax which I explained to you, or the tax would be computed under the state corporate income tax with three specific provisions in an attempt to meet what everybody recognized was, might pose some problems. The first one is the question of the apportionment of the income. Where the computation for income tax purposes of the income of a taconite or semi-taconite company. Where you run into trouble there is two-fold. In the first place some of these companies are so-called cost companies. They operate for steel plants and they are not in business in the sense that Three M is where they are making a product and selling it on the market. It would be our hope that other companies would be attracted to Minnesota that might not be in precisely the same position. You also run into a problem of actually, for instance, where a sale of a product of this type takes place, which, as you all know, under the apportionment formula could drastically alter this computation so for that reason *it was left in this measure, to the judgment of the legislature to determine how that apportionment should be made when the legislature sees fit to do so.*

(Emphasis added.)

property is *sold* by such trade or business and delivered or shipped to a purchaser located outside the state of Minnesota." (Emphasis added.) Here, Erie has not sold its taconite pellets; it only transfers the pellets to its out-of-state shareholders in exchange for payment to Erie of its cost of producing the pellets. To characterize this transaction as a sale elevates form over substance. Erie itself has recognized that, in substance, Erie's stockholders are joint venturers, using Erie as a vehicle for their enterprise. In 1952, when Erie and its shareholders applied for a closing agreement with the Internal Revenue Service for Erie to be treated as a cost company for federal income tax purposes, Erie stated in the application that, "[i]f these stockholders are treated as joint venturers, *which is in substance what they are*, the Government will be giving recognition to a common and traditional method of doing business in the iron ore industry." (Emphasis added.) In other words, though a separate corporate entity, Erie is really a conduit by which parties to a joint venture acquire taconite pellets at cost. Thus, we have great difficulty in characterizing Erie as a Minnesota business that sells its products to out-of-state purchasers.

Each shareholder's payment to Erie appears to be more like a contribution to capital insofar as money is transferred to Erie to enable it to produce the pellets. The payments are not simply made directly in exchange for pellets. In this context, we conclude Erie does not qualify as a Minnesota business that sells its product to out-of-state purchasers, and, consequently, Erie would be precluded from apportioning its income under section 290.19.

Erie argues that disallowing income apportionment under section 290.19 defeats the purpose of the Taconite Amendment to keep the occupation taxes of a taconite company on a parity with the income taxes paid by other corporations. This begs the question. The constitutional amendment provides that section 298.40 "shall

not be repealed, modified or amended for 25 years." The issue here, however, is not repeal, modification or amendment, but simply what the statute says. The fact is that section 298.40 does not say that taconite producers are to be taxed in the same manner as other manufacturing companies generally, but, rather, they are to be taxed in the same manner *except* that the income apportionment formula used by other manufacturing companies does not apply.[5]

Finally, both Erie and the Tax Court state that clause (b) compels apportionment because the proviso says that income "shall" be apportioned. But this mandatory "shall" advances the analysis nowhere, since it sheds no light on the rest of clause (b), especially the part we here italicize, namely, that "income shall be apportioned to Minnesota in the manner *which may be otherwise specified by law.*"

We hold, therefore, that the Tax Court erred in construing the aggregate occupation, royalty and excise tax ceiling under clause (b) of section 298.40 by allowing

---

[5] In 1980, while this litigation was pending before the Tax Court, the legislature enacted Minn. Stat. § 298.401 (1982), 1980 Minn. Laws, ch. 607, art. 7, § 10, which provides:

> All imputed income determined pursuant to section 298.40, subdivision 1, clause (b) is and shall be apportioned to Minnesota.

The legislature noted that "[s]ection 298.401 is a restatement of the intent of section 298.40, as originally enacted." The Commissioner argues that this enactment by the 1980 legislature explaining what the 1963 legislature intended should be given great weight in construing section 298.40. So stated, we think the argument is self-defeating, and we need not reach Erie's arguments that the 1980 legislation is an unconstitutional impairment of contract or that it violates the doctrine of separation of powers. Since the Taconite Amendment and section 298.40 created a contract between the state and Erie, the attempt by one party to the contract unilaterally and 17 years later to add words to that contract is of no probative value.

use of the apportionment formula under section 290.19 so as to lower the hypothetical income tax liability and thereby also lowering the ceiling on Erie's aggregate tax liability. We hold that clause (b) of section 298.40 is construed to read that a taconite producer's aggregate tax shall not exceed the amount such producer would pay if taxed under the income, franchise and excise tax laws generally applicable to manufacturing corporations transacting business in Minnesota, except that for the purpose of the computation of this hypothetical tax, income shall be apportioned to Minnesota as may be specified by the legislature otherwise than by sections 290.17 and 290.19.

Since apportionment of Erie's hypothetical income is not allowed by any statute, all of Erie's income is deemed allocated within Minnesota, with the result that Erie's aggregate tax liability, as assessed by the Commissioner, does not exceed the limitation imposed by clause (b) of section 298.40.

The Deductibility of the § 298.241 Production Tax

Production taxes paid by a taconite mining company are not subject to the tax liability limitation of section 298.40 and the Taconite Amendment. Minn. Stat. § 298.40, subd. 2 (1982). Production taxes may, however, be treated as a deduction in determining a mining company's occupation tax. Minn. Stat. § 298.03(6) (1982).

The issue here is whether the additional production taxes imposed under Minn. Stat. § 298.241 (1976) upon Erie for the years 1971 through 1974 were properly deductible in computing the taxable value of ore for the purpose of determining Erie's occupation tax liability. On this issue we agree with the Tax Court that the deduction was properly taken by Erie and affirm.

In computing the occupation tax, Minn. Stat. § 298.03 (1982) allows the mining company to take certain statu-

tory deductions from the mouth-of-the-mine value as part of the process of determining the valuation for the purposes of the occupation tax. Clause (6) of this statute allows as a deduction:

> (6) In the case of taconite, semi-taconite and iron sulphide operations, *the tax payable under section 298.24*, but not exceeding 25 cents per taxable ton, and that payable under section 298.35, on the concentrates produced in said year and any taxes paid under Laws 1955, Chapters 391, 429, 514, 565 or 540, *or any other law imposing on such taconite operations a specific tax for school or other governmental purposes.*

(Emphasis added.)

Prior to 1971 the only statute levying production taxes on taconite was section 298.24. That statute imposed a production tax base rate of 11.5 cents per ton subject to escalation by reference to the index for wholesale prices for all commodities. This tax was and remains an enumerated statutory deduction which may be taken from the mouth-of-the-mine value of taconite to arrive at the net income which will be subject to the occupation tax.

In 1971 the legislature enacted section 298.241, which imposed a tax "in addition to the tax imposed under section 298.24, subdivision 1" upon taconite, the mining and quarrying thereof, and the iron ore concentrate produced therefrom. 1971 Minn. Laws Ex. Sess. ch. 31, art. 30, § 7. The tax imposed under section 298.24 was gradually increased over a period of specified years, ranging from 4 cents per ton during 1971 to 14 cents per ton during 1979. Section 298.241 was repealed in 1977. *See* 1977 Minn. Laws ch. 423, art. 10, § 31.

The issue here is whether the "extra" production tax imposed under section 298.241 is deductible under section 298.03 in determining the amount of occupation tax to be paid, as is the production tax under section 298.24.

The problem here is that section 298.03(6) expressly allows a deduction for "the tax payable under section 298.24," but says nothing about deducting the tax payable under section 298.241, even though both sections refer to the same kind of production taxes. The Tax Court held that the taxes imposed by sections 298.24 and 298.241 "are identical in substance" and that "similar legislative intent, policy and purpose underlies both." The Tax Court further found that the section 298.241 production tax is a "specific tax for governmental purposes within the meaning of Minnesota Statutes 298.03(6)." Finally, the court concluded that the Commissioner's determination in 1971, contemporaneous with the enactment of section 298.241, that this tax was deductible under section 298.30, subd. 6, and its allowance of this deduction for 3 years before reversing its position, is persuasive evidence of the legislature's intent that the taxes payable under section 298.241 are deductible.

We agree that the section 298.241 tax is identical in substance to the section 298.24 tax, and we agree the legislature probably intended both taxes to receive equal treatment, but this is not enough to allow deductibility where the statute expressly mentions the section 298.24 deduction but says nothing about a section 298.241 deduction. Neither do we think the Commissioner's initial administrative interpretation allowing the deduction, although perhaps of some help, is at all conclusive. *See Sevick v. Commissioner of Taxation*, 257 Minn. 92, 103, 100 N.W.2d 678, 686 (1959) (departmental construction of statute may be persuasive but does not preclude a different construction by the courts).

We conclude, however, that the section 298.241 tax is included within the phrase of section 298.03(6) allowing a deduction for "any other law imposing on such taconite operations a speicfic tax for school or other governmental purposes." The Commissioner argues that the rule of *ejusdem generis* governs; that is, when a general descrip-

tive item follows an enumeration of specific items, the general item is restricted in its application to the immediately preceding specific items. In other words, the Commissioner would construe section 298.03(6) to permit deductions in three categories: (1) under section 298.24; (2) under 298.35; *and* (3) under the enumerated chapters of the 1955 Laws *or* any other similar law. We think, however, within the context of this statute, that the concluding phrase "*or* any other law" (emphasis added) modifies the entire preceding portions of the subdivision rather than merely the immediately preceding clause beginning with "any taxes paid under Laws 1955 * * *." This would explain why, when the legislature in 1971 added section 298.241, which was simply an increase in the production tax, it saw no need to amend section 298.03(6) to mention the new tax statute specifically, since it was covered by the concluding phrase "or any other law." This is how the Commissioner read the law for the first 3 years, and while, as we have said, this administrative interpretation of the law is not binding on the Commissioner nor on us, we think it was the correct reading.

Because of our disposition of the issues which we have now discussed, we need not take up the other issues raised by the parties.

Reversed on the aggregate tax limitation issue, and affirmed on the additional production tax deductibility issue.

APPENDIX C

STATE OF MINNESOTA
TAX COURT

Docket Nos. 2193, 2228, 2430

PICKANDS MATHER & CO., as MANAGING AGENT FOR ERIE MINING COMPANY,
Appellant

v.

THE COMMISSIONER OF REVENUE,
Appellee

and

RANGE MUNICIPALITIES and CIVIC ASSOCIATION,
Intervenor

Order dated November 25, 1981

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER FOR JUDGMENT AND MEMORANDUM

These consolidated appeals are from Orders of the Commissioner of Revenue determining occupation tax liability of Erie Mining Company under Minnesota Statutes, Chapter 298 for the calendar year ended December 31, 1974 (Docket No. 2193) and from redeterminations of the Commissioner under Minnesota Statutes, Sec. 298.09, subd. 4, of Erie's occupation tax liability for the calendar years ended December 31, 1971-1973 (Docket Nos. 2228 and 2430).

Subsequent to several pre-trial conferences, trial of these consolidated appeals commenced November 13, 1978 at the St. Louis County Court House in Hibbing, Minnesota and concluded November 16, 1978. During trial, the Court heard testimony from eight witnesses and received 116 exhibits including the parties' detailed Stipulation of

Facts dated November 16, 1978. On November 29, 1978, Appellee moved to reopen to conduct additional discovery, which motion was granted following hearing on December 7, 1978. This discovery was concluded by submission of the parties' second detailed Stipulation of Facts dated September 5, 1979. Subsequently, Appellant moved to reopen to conduct additional discovery, which motion, after hearing, was granted by Order of November 14, 1979. Pursuant to the Order, the results of this discovery were submitted to the Court by December 20, 1979. Pre and post trial legal memorandums were submitted. On September 12, 1980, Appellant moved the Court to take judicial notice of certain legislative history of Sections 10 and 12 of Laws of Minnesota 1980, Chapter 607, Article VII enacted April 23, 1980, which motion was granted.

Edward T. Fride and Paul J. Lokken of Hanft, Fride, O'Brien & Harries appeared for Appellant.

C. Hamilton Luther, Deputy Attorney General, and Thomas K. Overton, Special Assistant Attorney General, appeared for Appellee.

Fred Cina appeared for Intervenor.

SYLLABUS

The production tax assessed under Minnesota Statutes Section 298.241 is a tax deductible in computing the occupation tax.

The 1974 combined occupation, royalty and excise tax exceeds the hypothetical income tax limitation established by Section 298.40, subd. 1(b) and Minnesota Constitution 1976, Article X, Section 6 (The Taconite Amendment).

DECISION

The Orders of the Commissioner are reversed as specified in the Conclusions of Law.

John Knapp, Chief Judge

FINDINGS OF FACT

1. The Stipulations of Fact submitted by the parties of November 16, 1978 and September 5, 1979 are incorporated by reference.

2. Erie Mining Company is a Minnesota corporation with facilities at Hoyt Lakes and Taconite Harbor, Minnesota, whose sole business is mining taconite ore in Minnesota and processing or beneficiating the same into taconite pellets which are sold and shipped or delivered exclusively to non-Minnesota purchasers who consume the pellets in non-Minnesota steel making facilities.

3. The capital stock of Erie is owned in varying percentages by its shareholders, Bethlehem Steel Corporation (45%), Youngstown Sheet and Tube Company (35%), Interlake, Inc. (10%), and Stelco Coal Company (10%). Each shareholder is located outside of Minnesota and purchases Erie's pellets in proportion to its stock ownership, which pellets are delivered to and consumed in blast furnaces located outside of Minnesota.

4. Appellee is the duly appointed and acting Commissioner of the State of Minnesota Department of Revenue. Said office is now held by Commissioner Clyde Allen and in 1974 and 1975 was occupied by Commissioner Arthur C. Roemer who now serves as Deputy Commissioner.

5. Intervenor is an unincorporated association of cities, independent school districts and towns located in northeastern Minnesota.

6. In earlier years, Minnesota held almost a monopoly but by 1940, it was recognized that the heavy demand for raw materials by the nation's steel industry from the Minnesota Iron Range would result in the exhaustion of Minnesota natural ores. Severe unemployment and erosion of the tax base were seen as a corollary. The Minnesota legislature looked upon the development of the

vast taconite resources on the Mesabi Range as the only viable substitute for the natural ores. Recognizing the deficiencies in the ad valorem method of taxation which had been applied to the natural ores, the Minnesota legislature at the 1941 session enacted Chapter 375 which imposed a production tax on taconite in lieu of ad valorem taxes. Enactment of the taconite production tax law had the desired effect of encouraging development of that industry.

7. After passage of the taconite production tax in 1941, Erie began acquiring taconite reserve lands for possible future development. In 1942, it set up a laboratory in Hibbing, Minnesota to develop a flow sheet for implementation of the process being developed and to conduct further experimentation on the pilot plan basis. In 1946, Erie's shareholders authorized the construction of a preliminary plant at Aurora, Minnesota to test the flow sheet on commercial size equipment. This plan began operating in 1948 and soon annually produced 200,000 tons of taconite pellets which proved successful for use as blast furnace feed. Until mid-1952, it was the only taconite plant in the world to produce substantial quantities of taconite pellets from taconite rock. In the early 1950's, Erie began planning for the construction and operation of a commercial plant having a productive capacity of approximately 5.25 million tons of pellets annually. The undertaking presented difficulties in technological problems and economic uncertainties. Erie's shareholders intended to undertake the project essentially as a joint venture but were ultimately required to conduct the operation through Erie as a separate mining company since Erie was the lessee of non-assignable mineral interests, the permittee of federal and state permits and because of certain financing considerations. The shareholders determined that the project could be feasibly undertaken only if Erie was desregarded as a corporate tax-paying entity for federal income tax purposes, and

the shareholders taxed for those purposes as if they were conducting the operation on a joint venture basis. In an effort to obtain this treatment Erie and its shareholders filed an application for a Closing Agreement with the Internal Revenue Service providing for treatment as a "cost company" for federal corporate income tax purposes. The Internal Revenue Service granted this request of Erie and its shareholders by its ruling letter dated March 11, 1953 and Closing Agreement. (Exhibit No. 11). The Defense Production Administration granted Erie a Certificate of Necessity. (Exhibit No. 2). Construction of the contemplated facilities began in 1954, and operations were commenced in September 1957.

8. From the beginning of its operations and including 1974, the tax year here litigated, Erie was a "cost company" within the meaning of Rev. Ruling 56-542 of the Internal Revenue Service. The "cost company" concept dates back to 1909 and originated because it best filled the business necessities and government desires from iron ore production. In general, the only significance of Erie's cost company status is as it relates to the treatment of Erie and its shareholders for *federal* income tax purposes. Under the agreement with the Internal Revenue Service, it was recognized that the development of taconite projects such as contemplated by Erie were essential to the national interest and, to promote its feasibility, Erie was designated as a corporate non-taxpaying entity for federal tax purposes and its shareholders were taxed for those purposes as if they were conducting the operation on a joint venture basis. The "cost company" concept for mining was widely used in Minnesota and elsewhere. In 1963 when the Minnesota legislature enacted Minnesota Statute Sec. 298.40 and in 1964, at the time of the adoption of the Taconite Amendment, there were then only two taconite companies operating in Minnesota, Erie Mining Company and Reserve Mining Company, and they were both cost companies.

9. Erie Mining Company is subject to the taxes imposed by Minnesota upon members of the taconite industry: For 1974: Erie paid occupation taxes of $2,827,017.98 (this amount is the subject of dispute in this litigation); Erie paid royalty taxes imposed under Minnesota Statutes, Chapter 299, of $437,750; Erie paid taconite production taxes of $1,798,743 imposed under Minnesota Statutes, Sec. 298.24, and $1,383,964 imposed under Minnesota Statutes, Section 298.241; Erie paid the "taconite railroad tax" imposed by Minnesota Statutes, Sec. 294.22, of $1,367,998.10; Erie paid the special school taxes imposed under Laws 1965, Chapter 735, of $61,980. Erie's "non-project property" is subject to taxation under the normal ad valorem system. Its taconite reserve lands are subject to the tax imposed by Minnesota Statutes, Sec. 298.26. Any income it may receive not related to mining is subject to the state income tax. Erie was subject to the sales tax imposed under Minnesota Statutes, Chapter 297A, and the employer's excise tax imposed under Minnesota Statutes, Chapter 290.

10. The occupation tax was originally enacted at the 1921 session of the legislature as Chapter 223, Laws of Minnesota 1921. Because of concern that the occupation tax might be held unconstitutional, the 1921 legislature submitted a constitutional amendment specifically requiring the payment of "an occupation tax on the valuation of all ores mined and produced," such valuation to be "ascertained in the manner and method prescribed by law." The amendment was approved at the 1922 general election and became Article IX, Section 1A, of the Constitution (now codified as Article X, Section 3, under the amendment and restructuring of the Constitution as adopted by the people of the state on November 5, 1974). The imposition of the occupation tax preceded by twelve years the imposition of a state income tax. When the state income tax law was enacted in 1933, those subject to the occupation tax were expressly exempted from the

income tax wtih respect to income from mining. Many items of expense allowed as deductions for state corporate income tax purposes are now allowed as deductions for occupation tax purposes.

11. The occupation tax is computed as follows: Minnesota Statutes, Sec. 298.01, subd. 2, imposes the occupation tax against "the valuation of all taconite, semitaconite and iron sulphides mined or produced . . ." Minnesota Statutes, Sec. 298.03, specifies that this "valuation" is to be measured "at the place where . . . the ore is brought to the surface of the earth" (often referred to as "the value at the mouth-of-the-mine"), less the so-called "statutory deductions" set forth in paragraphs (1)-(6) of said Minnesota Statutes, Sec. 298.03. These statutory deductions relate primarily to expenses incurred in the actual process of mining the ore and bringing it to the surface of the earth, and include some or all of such items as cost of supplies used and labor performed in separating the ore and elevating it to the surface, cost of removing overburden, royalty paid or incurred for the right to remove the ore, certain ad valorem taxes, production taxes and certain other special taxes. Minnesota Statutes, Chapter 298, is silent as to the method by which the value of the ore at the mouth-of-the-mine is to be determined, except to say in Minnesota Statutes, Sec. 298.03, that "such value [is] to be determined by the Commissioner of Revenue." The Commissioner and his predecessors, under their interpretation and administration of the occupation tax law since their inception, have made this determination of value in the following manner: They have adopted the published Lake Eric price as the actual market value of the ore delivered at lower Lake Erie ports, and from that value they have worked backward to arrive at a value at the mouth-of-the-mine by subtracting certain expenses which would necessarily have to be incurred beyond the mouth-of-the-mine and which necessarily are reflected in the

Lake Erie price. This method adopted by the Commissioner has been judicially approved in a number of cases. The expenses subtracted by the Commissioner from the Lake Erie price to arrive at the value of the ore at the mouth-of-the-mine have traditionally been referred to as the "non-statutory" deductions. They have been so denominated because from the inception of the occupation tax until 1974, the granting of these deductions has not been pursuant to any statutory provision, but necessitated rather by the circumstances described above, whereby the Commissioner was required to adopt a method of determining the mouth-of-the-mine value. Principal among the non-statutory deductions have been, and continue to be, an allowance for stockpiling and loading costs, beneficiation costs, transportation and marketing costs, and certain miscellaneous expenses. After the non-statutory deductions are taken against the Lake Erie price to arrive at the value of the ore at the mouth-of-the-mine, and after the statutory deductions are taken against the mouth-of-the-mine value, the remainder represents the taxable value of the ore. Against the taxable value is applied the rate of tax provided in Minnesota Statutes, Sec. 298.01, which for 1974 was in the amount of fifteen percent (15%), to arrive at what the Department of Revenue denominates as the total gross tax. Against the gross tax are applied certain credits, the principal one being the labor credit as provided under Minnesota Statutes, Sec. 298.02. The amount remaining after application of these credits is the net amount of tax due.

12. Findings of the 1956 report of the Governor's Minnesota Tax Study Committee received as Exhibit No. 4 included:

> ". . . the [occupation] tax rate is almost twice as high as the corporate income tax rate and the tax base is probably as much as or more than twice as broad.

> Iron ore production in Minnesota is subject to much heavier taxation than is business in general and Minnesota's taxes appear to be considerably higher than those imposed in the Canadian provinces or in other states in which petroleum, natural gas and other mineral products are of comparable importance."

These findings were not contradicted by other evidence, find additional support in the record and are adopted by the Court.

13. The Minnesota Legislative Commission on Taxation of Iron Ore was originally created by Laws of Minnesota 1951, Section 2, Chapter 714, and its activities were continued by successive legislative appropriations. The purposes for which this Commission was created include:

> "Such Commission shall make a comprehensive, detailed and complete investigation and study of all the factors contributing to a sound iron ore tax policy for this state, including information regarding the quality and extent of Minnesota's iron ore reserves and those in other parts of the world; the cost of developing Minnesota iron ores and those in other parts of the world; the advisability of using the Lake Erie price as a tax base; the impact of national defense considerations; and the possible construction of the St. Lawrence Waterway by either Canada or the United States or both, upon the Minnesota iron ore industry, and other related factors, for the purpose of formulating a stable and fair policy for the taxation of iron ore and in order that the state shall receive the maximum possible benefit from this natural resource."

In its Report submitted to the Minnesota Legislature of 1961 the Commission stated in part:

"It would appear that the most significant competition faced by the Minnesota iron ore industry is the competition for capital investments. Once a large capital investment is made in an iron ore production facility by a steel company, that production assumes a preferred position with the company because of the need to amortize the investment.

* * * *

"Canadian iron ore reserves are very important in evaluating the competitive position of Minnesota's iron ores, not only because of the fact that geographically their proximity to already established markets is significant, but also because of the variety of types and quality of ores available in Canada. It is important too, to note that a flow of capital from the United States into Canada has taken place in developing the Canadian iron ore resources. Many factors, including taxation of iron ore, will affect the extent of development of the iron ore in Canada, but it is very evident that Canada is taking a front seat in its production and that from any vantage point today that country has the potentialities to achieve the position of being one of the great iron ore producing areas of the world.

* * * *

"Because of the decline in reserves of Minnesota's high grade natural ore, and decrease in demand for much of the remaining natural ores, the construction of new taconite and semi-taconite plants is imperative if Minnesota is to retain its share of the iron ore market and if employment is to be stabilized on the Iron Range. If this goal is to be reached there must be an influx of hundreds of millions of dollars of new capital. Minnesota must compete for this capital with areas in Canada and South America which have huge reserves both of high quality direct-shipping ores, and also enormous reserves of mate-

rial which can produce high grade concentrates by methods which have been proved to be both economically and technologically feasible.

"The need for Minnesota to compete for new capital is both immediate and urgent. When taconite-like plants are built elsewhere, the products produced assume competitive priority, not only because of the high quality of the products but because of the need to amortize the large investments.

* * * *

"The comparative low cost per ton-mile of ocean shipping helps to bring South American reserves into competition with traditional markets for Minnesota ores. The fact that the ocean carriers are much larger than those of the Great Lakes, and usually are manned by low-paid foreign crews, reduces the cost of ocean shipping. The South American ores being shipped are, of course, of a much higher grade than Minnesota's natural ores. The South American reserves are great enough to maintain a much greater production than now is current. * * *"

In its Conclusions and Recommendations the Commission in its 1961 Report stated:

"In its 1957 report, this Commission concluded that 'the history of taxation in Minnesota shows very clearly that iron ore has been taxed on a more onerous basis than any other class of property. The reason for the higher rate of tax can be traced to the premise that iron ore is a natural resource and a diminishing asset and therefore should stand a heavier burden of taxation.

'When Minnesota had a monopoly on low cost open pit iron ore this premise may have been justified but conditions have changed. High grade ore is rapidly diminishing—high cost concentrates made from low

grade ore are increasing—plants to manufacture iron ore from taconite are under construction to supplement the dwindling supply of natural ore—competiiton from the large deposits of high grade ores in Canada and Venezuela is now a reality.

'Higher taxes on iron ore would have the following effects:

1. 'Cause foreign ores to become more competitive;

2. 'Hasten depletion of remaining high grade ore reserves;

3. 'Be detrimental to many small high cost mine producers;

4. 'Tend to discourage further investments in Minnesota's taconite industries.'

"Developments since that time has emphasized the correctness of this conclusion. * * *

"The need for Minnesota to compete for new capital is both immediate and urgent. When taconite-like plants are built elsewhere, the products produced assume competitive priority, not only because of the high quality of the products but because of the need to amortize the large investments made. * * *"

These uncontradicted findings of the Commission were received by the Court as Exhibit No. 5 and are adopted by the Court.

14. The Governor's Minnesota Tax Study Commission 1962 report received as Exhibit No. 6 included findings that:

"It is generally conceded that the position of natural high grade Minnesota ores has changed markedly in the years since the middle 1950's. What was once thought of as a near monopoly situation is fast

deteriorating into a highly competitive situation where the natural high grade ores of Minnesota appear daily to be in a worsening position . . . .

The reason for our worsening position seems to stem from three factors which are for the most part beyond the control of the State of Minnesota or any of its political subdivisions. They are not completely beyond control because there are some actions which might be taken to help the situation, but nothing which might restore the old monopoly position.

The first factor is that of changes in the situation of iron ore in the world. The expansion of iron ore mining in Canada, Venezuela, Brazil, with additional possibilities in Africa and other places around the world has considerably increased the total world supply of iron ore. In the shore-run this has created a so-called 'glut' on the world iron ore market. This is similar to the situation which was created in the oil market during the 1950's. Other countries are going to do everything possible to develop their resources in this important field, and the development and availability of more shipping facilities make it possible to supply customers around the world, including customers within the United States. The best Minnesota can hope for is a vigorous and aggressive iron ore industry to keep Minnesota ores as competitive as possible in the face of these widespread pressures from around the world.

A second factor stems from improvements in steel making technology which are changing the nature of the entire iron ore industry. This new technology is requiring a higher grade of iron ore as a basic raw material, with the result that those ores formerly thought to be "high grade" are rapidly becoming obsolete. In other words, improvements in the steel making process are placing more stringent demands on this very first stage in the steel making

process. As a result, all natural ores in Minnesota will need some beneficiation in the years to come, but even then they will probably not meet all the requirements. Instead, a new-comer has entered the field, namely, taconite, which seems to have a decided edge over the best grade natural ore which has been beneficiated. While this is a difficult pill for Minnesota to swallow, it will have to admit that its so-called high grade ore, which was once its pride and joy, is the victim of technological obsolescence.

A third factor which must be taken into account is the apparent growth in the competition for many of the markets which have been traditional markets for steel. Substantial inroads are being made by various substitute products. The use of aluminum, for example, has been growing at a far greater rate than steel. This is also true for plastic, glass, paper, and other materials, which have invaded the market for specific products formerly made only of steel. . . . These three factors, therefore, are combining to place Minnesota iron ore in an unfavorable position.

A still further point which must be made, because it also has a direct bearing upon the entire iron ore industry, is that high grade ores are being rapidly depleted. In light of what has been said earlier, it is probable just as well that this is the case. Otherwise we might have a very large supply of ore which has become technologically obsolete. It should be pointed out that necessity is the mother of invention and one of the reasons why the remaining high grade ore is losing its position is due to the fact that those directly concerned with the technology could foresee this day coming and have made important strides in preparing for it. In any event, the facts seem to indicate that, given the present rate of production, high grade ores will be substantially depleted in Minnesota within the next 5 to 7 years."

These findings are not contradicted in the evidence and are adopted by the Court.

15. Uncontradicted testimony presented to the Court by the author of a 1963 study, "Iron Mining and Taxes in Minnesota" received as Exhibit No. 8 found:

> "* * * Taxes paid by mining companies under the occupation tax are much higher than if these companies were taxed under the Minnesota corporation income tax. * * * If the mining companies were taxed as other corporations in the state, the following expenses would also be allowed as deductions:
>
> 1. Federal income taxes paid.
> 2. Sales Discounts.
> 3. All ad valorem taxes paid during the year.
> 4. Royalty taxes.
> 5. Depletion—this would allow amortization of the purchase price of the mine.
> 6. Losses incurred by individual mines could be carried forward to future years. * * *"

16. By 1963, Minnesota's earlier position as a supplier of iron ore to the nation's steel making facilities had been adversely affected to a substantial degree. Among factors cited as influencing the decline was the depletion of high grade ore, the decrease in demand for much of the remaining natural ores, increasing world and national competition, changing blast furnace practice and technology, the construction of the St. Lawrence Seaway permitting delivery of foreign ore to lower lake ports of the United States and state taxing policies.

17. Among the results of the decline specified in paragraph 16 was significant unemployment, instability of the Minnesota iron mining industry and loss of Minnesota tax revenues. With the decline of Minnesota natural ores and changing competitive factors there was increas-

ing interest in developing the vast reserves of low grade ore such as taconite and semi-taconite found in Minnesota. Taconite and semi-taconite are also found outside of Minnesota with resulting competitive pressures. Large capital investments are required for construction or expansion of taconite-producing facilities. State tax policies are among factors cited by potential investors which influence the decision of the investors whether to expand or invest in the development of taconite in Minnesota.

18. In recognition of the described findings, the Minnesota legislature enacted on March 18, 1963, HF 1149 as Chapter 81, Laws of Minnesota 1963, codified as Minnesota Statutes Sec. 298.40. This bill provided that it was,

> "An act declaring the policy of the state with respect to the taxation of taconite and semi-taconite, and the facilities for the mining production, and beneficiation thereof."

In relevant part the Act provided:

> "Subdivision 1. The combined occupation, royalty and excise taxes imposed upon ore required to be paid with respect to the mining, production or beneficiation of taconite or semi-taconite by any person or corporation engaged in such mining, production or beneficiation, shall not be increased so as to exceed the greater of (a) the amount which would be payable if such taxes were computed under the laws in existence as of July 1, 1963, or (b) the amount which would be payable if such person or corporation were taxed with respect to such mining, production or beneficiation under the income, franchise, and excise tax laws generally applicable to manufacturing corporations transacting business within the state, as such laws may be enacted or amended from time to time * * *."

Subdivision 2. Taxes imposed upon the mining or quarrying of taconite or semi-taconite and upon the production of iron ore concentrates therefrom, which are in lieu of a tax on real or personal property shall not be considered to be occupation, royalty, or excise taxes within the meaning of this section."

19. The enactment of Chapter 81, Laws of Minnesota 1963 was accompanied by the enactment of Chapter 99, Section 1, Laws of Minnesota 1963, hereafter referred to as the "Taconite Amendment."

Its preface stated:

"An act proposing an amendment to the constitution of the State of Minnesota by adding thereto a new article prohibiting the amendment, modification, or repeal for a period of 25 years of Laws of Minnesota 1963, Chapter 81, relating to the taxation of taconite and semi-taconite, and facilities for the mining, production and beneficiation thereof; and to taxes imposed upon or required to be paid with respect to the mining, production or beneficiation of copper, copper-nickel, and nickel in this state."

The Taconite Amendment was submitted to and approved by the voters of Minnesota at the November, 1964 general election. It was incorporated into the Minnesota Constitution as Article XXI and is now codified and hereafter referred to as Article X, Section 6, as a result of the amendment and restructuring of the Minnesota Constitution as adopted by the people of the State November 5, 1974. Prior to submission to the public, the form and content of the Taconite Amendment was the subject of extensive consideration, debate and ultimate agreement among leaders of political parties, industry, labor, public and others. Some 540 Minnesota organizations endorsed the amendment.

The Taconite Amendment provides in relevant part that:

"Notwithstanding any other provision of this Constitution, Laws of Minnesota 1963, Chapter 81, relating to the taxation of taconite and semi-taconite, and the facilities of the mining, production and beneficiation thereof shall not be repealed, modified or amended, nor shall any laws in conflict therewith be valid for a period of twenty-five (25) years after the adoption of this Amendment; * * *"

20. The purpose of said legislation and Taconite Amendment was to provide incentives, assurances, and legal commitments to encourage investors to build and operate new taconite production facilities and to continue and expand existing taconite facilities in Minnesota.

2. Following the passage of the Taconite Amendment, Appellant and others invested millions of dollars in new or expanded taconite production facilities in Minnesota in reliance on said Amendment.

22. Appellant is among those taconite producers who are beneficiaries of the Taconite Amendment and intended to be protected by Chapter 81, Laws of Minnesota 1963 and the Taconite Amendment.

23. In its Report subsequent to the adoption of the Taconite Amendment submitted to the Minnesota legislature in 1965, the Minnesota Legislative Commission on Taxation and Production of Iron Ore submitted findings that:

"The Legislative Commission on Taxation and Production of Iron Ore has followed closely the problems of Minnesota's iron mining industry. Over the years, the Commission's recommendations have always been aimed toward strengthening the state's mining industry, while at the same time keeping in mind the best interests of the State of Minnesota and its people.

"Members of this Commission have made inspection trips during the past 15 years, to mining and steel-

making centers in Minnesota, the United States, Canada and South America to study the mining industry's problems and competition in greater perspective.

"Further, this Commission was extremely gratified to witness the voters of Minnesota ratify the Taconite Amendment by an 86 percent majority of those voting on the issue.

• • • •

"As rapid as this growth may seem, in the early 1960's it became apparent to many that Minnesota was not attracting its fair share of new taconite plant investment. To alleviate this problem, the 1963 Legislature passed the proposed Taconite Amendment which was subsequently ratified by the voters of Minnesota on November 3, 1964. Passage of this amendment and the announcements of plants that followed certainly make 1964 one of the most important years in Minnesota's mining history.

"New taconite plants that are now under construction or that have been announced for Minnesota are contained in Table 13. In addition to these plans, Jones & Laughlin Steel Corp. is planning a 1.6 million ton plant near Biwabik. When completed, these plants will boost Minnesota's taconite production almost ninety percent to a total of 32 million tons per year.

• • • •

"Since the Commission was first established, its members have observed a vast change in iron ore mining, marketing and use. A parallel change has characterized the entire steel industry as new technology has brought about increased efficiencies. The new technologies which have been brought into use in the steel industry have had a profound impact upon Minnesota's position as a major iron ore producer.

"The modern iron ore industry must respond to new demands brought about by changing technology—demands which require increased production of beneficiated iron ores, including iron ore pellets produced from taconite, jasper and similar materials as well as prepared, sized iron ores which can meet quality and structural standards.

"Minnesota's ability to respond to the changes in the iron ore market have been advanced by research efforts carried out at the University of Minnesota and by various mining companies, particularly as they have related to the mining and concentration of taconite. The development of Minnesota's taconite industry has offset the decline of our natural iron ore industry, and this offset has reduced the effects of the economic downturn that has accompanied the loss of markets for Minnesota's natural iron ore.

"Passage of the Taconite Amendment in 1964 has served to strengthen Minnesota's taconite industry as evidenced by the renewed flow of investment money into Minnesota for the construction of new and additional taconite facilities. Certainly, Minnesota's taconite resources are large and abundant, sufficient for the support of a much larger taconite industry. Efforts to develop economically feasible methods for the concentration of semi-taconite and non-magnetic taconites should be continued. * * *

"Chapter 81 . . . [codified as Minnesota Statutes, Sec. 298.40] provides that taxes for taconite and semi-taconite will not be increased unless the amount that the mining companies would pay under the corporate income tax were to go up. That is, if the tax on the other manufacturing industries is raised up to, and above, the level of taxes now paid by the taconite mining industry, the taxes on taconite mining could be raised apace."

These uncontradicted findings of the Commission were received by the Court as Exhibit No. 12, find additional support in this record and are adopted by the Court.

24. Chapter 81, Laws of Minnesota 1963 and the Taconite Amendment thereafter enacted constitute a contract between the State of Minnesota and those investing in new, expanded or continuing taconite production facilities in reliance thereon.

25. Ignoring the limitations contained in Minnesota Statutes Sec. 298.40 and the 1964 Taconite Amendment, significant statutory changes increasing the amount of occupation and royalty taxes payable by the taconite industry were made in 1971 and thereafter significant changes in the interpretation of the laws by the Commissioner resulting in increased occupation and royalty taxes were made. In 1971, the legislature through enactment of Ex. Sess., c. 31, art. IV, Laws of Minnesota 1971, increased the rate of both the occupation tax and the royalty tax on taconite from twelve percent to fifteen percent, and limited the applicability of the labor credit.

26. The labor credit was specifically limited by Ex. Sess., c. 31, art. IV, Laws of Minnesota 1971, in the following manner: Prior to the enactment of said Article IV, the maximum labor credit available with respect to the occupation tax was expressed by Minnesota Statutes, Sec. 298.02, in the following terms:

> ". . . That in no event shall the credit allowed hereunder be in excess of 75 percent, as applied to underground and taconite or semi-taconite operations, and 60 percent as applied to all other operations, of the total tax computed under the provisions of section 298.01, subdivision 1 . . ."

Since prior to the enactment of said Article IV the occupation tax rate against which labor credits were applied was 11 percent, the maximum labor credit available to taconite

producers was 75 percent of 11 percent of the valuation of the ore. Subsequent to the enactment of Article IV, however, and notwithstanding the increase in the occupation tax rate to 15%, the maximum labor credit available with respect to the occupation tax under Minnesota Statutes, Sec. 298.02, was limited to,

> ". . . Three-fourths of eleven percent . . . of the valuation of the ore used in computing the tax under the provisions of section 298.0. . . ."

Thus, while Article IV increased the occupation tax rate to 15 percent, it reduced the proportion of the occupation tax to which the labor credit was to be applied. Article IV limited in precisely the same manner the maximum labor credit available with respect to the royalty tax under Minnesota Statutes, Sec. 299.012.

27. The Commissioner in determining Erie's 1974 occupation tax applied to the taxable value of taconite as determined by the Commissioner the rate of fifteen percent as compared with the rate of twelve percent which was applicable in 1963, and limited the effect of the labor credit as required under Ex. Sess., c. 31, art. IV, Laws of Minnesota 1971. Additionally, the rate of fifteen percent was applied to royalties paid by Erie in determining Erie's royalty tax liability as compared with the rate of twelve percent which was previously applicable in 1963. Occupation taxes on taconite were further increased by the enactment of Chapter 556, paragraph (7) of Minnesota Statutes, Sec. 298.03, was amended to limit the deduction for interest on plant investment and shrinkage in computing the taxable value of taconite for occupation tax purposes. The language added to said paragraph (7) by said Chapter 556 was:

> Deductions for interest on plant investment shall not exceed the greater of (a) four percent of book value, or (b) the amount actually paid but not exceeding six percent of book value. No subtraction shall be al-

> lowed for shrinkage of iron ore except that which can be measured in a manner determined by the Commissioner of Revenue. In no case shall the shrinkage subtraction exceed one-quarter of one percent of the value of the ore.

In accordance with the foregoing provisions, the Commissioner, in determining the 1974 occupation tax of Erie, reduced its deduction for interest on beneficiation plant investment for the second half of 1974 from the rate of six percent allowed in 1963 and subsequent years to the rate of four percent of book value, or the amount actually paid not exceeding six percent of book value. Additionally, the Commissioner reduced Erie's deduction for shrinkage for the second half of 1974 in shipments to lower lake ports from the .5% allowed for the taxable years from 1963 to 1967, and 1.0% allowed for the taxable years from 1967 to 1973, to such amount as could be measured by the Commissioner, not exceeding, however, .25%.

28. For the calendar year 1974, Erie was subject to the production tax as imposed by Minnesota Statutes, Sec. 298.24 and Sec. 298.241. The production tax, as imposed under each of the provisions, is levied on the basis of a specific amount per ton of merchantable iron ore concentrate produced. The production tax is in addition to the occupation tax, the royalty tax and the taconite railroad tax. It is in lieu of ad valorem on real and personal property.

29. The production tax, as imposed under Minnesota Statutes, Sec. 298.24, was originally adopted by the legislature in 1941 as Chapter 375, Laws of Minnesota 1941. The tax imposed under that provision was at a base rate of five cents per gross ton of concentrate. In 1969, the Minnesota Legislature amended Minnesota Statutes, Sec. 298.24, to increase the base rate from 5 to 11.5 cents per ton. The 1971 Legislature again increased the production tax through the adoption of Ex. Sess., c. 31, art. XXX,

section 1, which was incorporated into the Minnesota Statutes as Section 298.241. This statute provided for a graduated increase in the production tax over a period of years from four cents per ton during the year 1971 to fourteen cents per ton during the year 1979 and each year thereafter.

30. Contemporaneous with its 1971 enactment, the Commissioner determined that the production tax as payable under Minnesota Statutes, Sec. 298.241, was deductible in determining the value of ore for occupation tax purposes under Minnesota Statutes, Sec. 298.03, subd. 6. The Commissioner recognized this deduction in computing the occupation taxes of Erie and the other taconite producers for the years 1971 through 1973. In calculating the occupation taxes payable by Erie in 1974, the Commissioner initially made the same determination but then reversed this previously existing practice and determination, and denied this deduction. In addition to denying this deduction in calculating the 1974 occupation tax of Erie, the Commissioner also redetermined the 1971-1973 occupation taxes of Erie on this basis.

31. The taxes imposed by Minnesota Statutes 298.24 and 298.241 are identical in substance. Section 298.24, subdivision 1 states:

> "There is hereby imposed upon taconite and iron sulphides, and upon the mining and quarrying thereof, and upon the production of iron ore concentrate therefrom, and upon the concentrate so produced, a tax of 11.5 cents per gross ton of merchantable iron ore concentrate as produced therefrom. * * *"

Section 298.241, subdivision 1 states:

> "In addition to the tax imposed under section 298.24, subdivision 1, there is hereby imposed upon taconite and iron sulphides, and upon the mining and quarrying thereof, and upon the iron ore concentrate pro-

duced therefrom, and upon the concentrate so produced, (i) a tax of 4 cents per gross ton of merchantable iron ore concentrate produced therefrom. * * *"

32. Similar legislative intent, policy and purpose underlies both Minnesota Statutes 298.24 and 298.241.

33. The Commissioner's determination contemporaneous with the 1971 enactment of Minnesota Statute 298.41 consistently applied for the years 1972 and 1973 and initially for 1974 to allow the tax paid thereunder as a deduction under Minnesota Statute 298.03, subd. 6, is entitled to weight.

34. The production tax imposed under Minnesota Statute 298.24 is a specific tax for governmental purposes within the meaning of Minnesota Statutes 298.03(6).

35. When the 1971 legislature increased the production tax through the enactment of Minnesota Statutes, Sec. 298.241, it adopted a "Declaration of Policy" through the enactment of Minnesota Statutes 1971, Sec. 298.242, which Declaration assured taconite producers that no further increases in the production tax would be effected at least through 1979. Minnesota Statutes 1971, Sec. 298.242, stated:

"In order to promote the health and welfare of the residents of the iron range communities, the economic well-being of that area and the state and further in order to encourage continued operation of existing taconite facilities and the construction of expanded or new taconite facilities in Minnesota, the Minnesota legislature hereby declares as the policy of the state that those who have invested in taconite facilities, those who are expanding such facilities or those who may wish to invest in new taconite facilities may be assured of continued fair and equitable treatment by the Minnesota legislature and may rely upon the state to maintain the production taxes on taconite set under existing law and section 298.241 at a level no higher

than that prevailing as of the effective date of this act through the year [1979] prescribed in said section 298.241 for the last incremental increase."

In 1975, the legislature repealed this Declaration by enacting Chapter 437, Art. 11, Sec. 7 and increased the production tax through the adoption of what became Minnesota Statutes 1975, Sec. 298.243. This provision imposed a tax of 39 cents per gross ton on concentrate in addition to the tax imposed under Minnesota Statutes, Sec. 298.24 and 298.241.

36. In its January 1973 Report, received as Exhibit 74D, the State of Minnesota Tax Study Commission made recommendations to the Governor and the 1973 Legislature which included a proposed change in the statutory basis under which sales are allocated for income tax purposes:

"This commission recommends that the present basis for determining a sale attributable to Minnesota for allocation purposes be changed. Under present Minnesota law a sale is counted at the place where it originates. Most states use the destination of a sale as the basis for determining whether it is attributable to them for allocating purposes. The origin basis tends to make it harder on Minnesota businesses selling out of state from Minnesota offices. On the other hand, the destination sales basis would act as an incentive to Minnesota firms selling their products out of state."

37. In 1973, the Minnesota Legislature adopted Chapter 650, Article VII, Sec. 1, amending Minnesota Statute 290.17 in part, relating to trade or business carried on partly within and partly without this state by providing:

"For the purposes of this clause, trade or business located in Minnesota is carried on partly within and partly without this state if tangible personal property

> is sold by such trade or business and delivered or shipped to a purchaser located outside the State of Minnesota * * *"

Said Chapter 650 also amended Minnesota Statute 290.19 by adding a provision relating to determination of sales made within this state as follows:

> "Sales of tangible personal property are made within this state if the property is delivered or shipped to a purchaser within this state, and the taxpayer is taxable in this state, regardless of the f.o.b. point or other conditions of the sale * * *".

The intent of such legislation was to encourage the continuance, location or expansion of Minnesota business by changing the test to determine Minnesota sales from an origin basis to an ultimate destination basis of the products sold by Minnesota business. In the application of the destination test, the legislative intent was to focus upon the ultimate destination of the product as determined by the location of the market or consumer state rather than technical matters such as f.o.b. points or conditions of sale.

38. Under the Erie Operating Agreement (Exhibit No. 3), entered into among Erie and its shareholders, the shareholders have the right and obligation to purchase Erie's entire production of taconite pellets. Within specific limits, each shareholder orders from Erie the quantity of taconite pellets it desires to have delivered to it. As consideration for such pellets, each shareholder pays Erie, proportionate to its receipt of pellets, for all Erie's expenses of mining and producing such pellets.

39. A minor portion of Erie's 1974 production was transported out of state to Bethlehem by railroad cars of a common carrier directly from Erie's beneficiation plant at Hoyt Lakes while the remainder was transported from Erie's plant over the company railroad to the loading facilities of the company situated at Taconite Harbor, Min-

nesota and there directly transported by vessel without further processing, outside the State of Minnesota. This vessel transport was another link in the transportation system of ore to the blast furnace, the ultimate destination. The value, for tax purposes, of such pellets is that established by Lake Erie ports. No steel making facilities exist in Minnesota which can make beneficial use of the taconite pellets produced by Erie.

40. The first and only beneficial use of the taconite pellets is as a raw material used in the production of steel and pig iron in blast furnaces which are all located outside of Minnesota. Mechanisms used to transport and deliver the taconite pellets to the blast furnaces include shovels, conveyors, trucks, trains and ships.

41. Initially, in 1979, the Commission's Advisory Committee and the Commissioner issued "guidelines" with respect to the 1973 amendments to Minnesota Statute 290.19 including:

> "Under Minnesota Statute 290.19, subd. 1(a) sales are to be assigned within and without this state upon the basis of the *ultimate destination* of the tangible personal property and not upon the particular form of transportation or terms of delivery." (emphasis added) (G.T. Caulfield deposition, Exhibit Nos. 5 and 20, submitted December 20, 1979).

42. Erie is incorporated as a separate legal entity under the laws of the State of Minnesota. As a separate legal entity, it either owns or has taken a leasehold interest in the properties from which it mines crude ore. It has legal title to the crude ore it mines once it has been separated from the earth. Erie holds title to the plants and equipment used in beneficiating the crude ore into pellets, and it retains ownership of the pellets until title to the same is transferred by Erie to its shareholders for a valuable consideration. Such transfer constitutes a sale

under Minnesota Statutes 290.17, subd. 4 and 290.19, subd. 1(a).

43. Erie Mining Company's trade or business is carried on partly within Minnesota and partly without Minnesota within the meaning of Minnesota Statutes, Sec. 290.17, subd. 4. The pellets produced by Erie constitute tangible personal property which are sold by Erie and delivered or shipped to purchasers located outside of Minnesota. All of such sales should be assigned outside Minnesota within the meaning of Minnesota Statutes, Sec. 290.19, subd. 1(a).

44. Within the meaning of Minnesota Statute 290.19, 100% of Erie's total tangible property used in connection with its trade or business is located within Minnesota, 100% of Erie's total payroll in connection with its trade or business is in Minnesota, and 100% of Erie's sales are made outside Minnesota.

45. Exhibit No. 100 was received without objection and graphically illustrates the differences between the occupation and royalty tax laws and the Commissioner's interpretation and administration of those laws as of July 1, 1963, and those laws and interpretations for the calendar year ended December 31, 1974:

Item of Difference	As of July 1, 1963	1974
A. Occupation Tax Laws		
1. Deduction for interest on plant investment.	Allowed uniformly at 6% of book value, whether more or less than the amount actually paid.	Allowed in an amount not to exceed the greater of (a) four percent (4%) of book value, or (b) the amount actually paid but not to exceed six percent (6) of book value (this change became effective July 1, 1974).

Item of Difference	As of July 1, 1963	1974
2. Deduction for shrinkage.	Allowed uniformly at .5% of the value of the ore, regardless of the actual amount, whether more or less than .5%.	Allowed in an amount not to exceed that which can be measured but in no event more than .25% (this change became effective July 1, 1974).
3. Rate of tax.	12% of the taxable value of the ore, subject to credits against tax.	15% of the taxable value of the ore, subject to credits against tax.
4. Effective rate of tax after taking into account the labor credit.	3.75% of the taxable value of the ore.	6.75% of the taxable value of the ore.
5. Deduction for production tax.	All production taxes then imposed allowed as a deduction under Minnesota Statute, Sec. 289.03(6).	Commissioner in 1974 reversed previous practice and allowed as a deduction only a portion of the production taxes the imposed, disallowing the production tax payable under Minn. Stat., Sec. 298.241.
B. Royalty Tax Laws		
1. Rate of tax	12% of royalties paid.	15% of royalties paid.
2. Effective rate after taking into account the labor credit.	3.75% of royalties paid.	6.75% of royalties paid.

46. Issues addressed to the Court include whether the Commissioner assessed an occupation tax against Erie for 1974 in excess of the amount permitted under Minnesota Statutes, Sec. 298.40, and Article X, Section 6, of the Minnesota Constitution. Minnesota Statutes, Sec.

298.40, provides that the combined total of Erie's occupation, royalty and excise taxes for 1974 cannot exceed the greater of (a) the combined total of Erie's occupation, royalty and excise taxes for 1974 if computed under the laws in existence as of July 1, 1963, or (b) the amount of taxes which would be paid by Erie with respect to its mining operations if in 1974 it would have been subject with respect to those operations to the then existing income, franchise and excise tax laws generally applicable to manufacturing corporations transacting business within this state. The application of this limitation involves the proper computation and comparison of a number of different types of taxes for a number of different years. First, Erie's occupation, royalty and excise tax liabilities under the laws in existence in 1974 must be separately computed and totaled. Second, Erie's occupation, royalty and excise tax liabilities under the laws in existence on July 1, 1963, must be separately computed and totaled. Third, Erie's liability under the income, franchise and excise tax laws in existence in 1974 must be separately computed and totaled under the assumption that Erie operated in that year as an ordinary Minnesota manufacturing corporation. After these various computations have been made, Erie's occupation tax liability under the laws in existence on July 1, 1963, must be compared with hypothetical liability under the income, franchise and excise tax laws in existence in 1974 generally applicable to manufacturing corporations. A determination must then be made whether the greater of these two amounts is less than the computation of Erie's occupation, royalty and excise tax liability under the laws in existence in 1974. If so, Erie's 1974 occupation, royalty and excise tax liability must be limited to that amount.

47. This process has been simplified because of the many matters which have been resolved by the Stipulation of Facts (Exhibit No. 106). There is no dispute

either as to Erie's royalty tax liability under the laws in existence as of July 1, 1963, or its royalty tax liability under the laws in existence in 1974. As a result, this Court is not required to make any determination as to the actual computation of Erie's royalty tax liability for any year in connection with this appeal. There is no dispute as to the amount of excise taxes incurred by Erie in any year relevant to this appeal. Therefore, no determination is required as to the computation of Erie's excise taxes for any year. This Court is concerned with the computation of three basic taxes: (1) the amount of Erie's occupation tax liability under the laws in existence in 1974, (2) the amount of Erie's occupation tax liability under the laws in existence as of July 1, 1963, and (3) the amount of income and franchise taxes Erie would be hypothetically required to pay as computed under the income and franchise laws in existence in 1974 generally applicable to manufacturing corporations transacting business within the state.

48. Chap. 81, Laws 1963, now codified as Minnesota Statute 298.40, subsequently approved by the people through their adoption of Art. X, Sec. 6 of the Minnesota Constitution, includes the phrases, "as such laws may be enacted or amended from time to time" and "income shall be apportioned to Minnesota in the manner which may be otherwise specified by law" to ensure that in computing the hypothetical income, franchise and excise taxes which a taconite company would pay if taxed as a manufacturing corporation transacting business within the state, the computation would reflect the current rates, allowable deductions and income apportionment of such manufacturing corporations as may be enacted during the 25-year period of the Taconite Amendment.

49. In computing the limitation amount applicable to Appellant in 1974 under Minnesota Statute 298.40, subd.

1(a), the objective is to arrive at the amount of occupation tax which would have been hypothetically payable by Appellant for 1974 if its 1974 operations were subject to the occupation, royalty and excise tax laws as they existed in 1963.

A. In 1963, the Commissioner authorized a deduction for interest on plant investment at the rate of 6% book value. In computing the 1974 occupation tax under Minnesota Statute 298.40, subd. 1(a), for the purpose of determining what tax would be payable in 1974 under the occupation tax laws in existence in 1963, interest at the rate of 6% of book value is a proper deduction. Similarly, shrinkage equal to .5% of the value of the ore as authorized in 1963 is properly deductible in making the computation for 1974 under the 1963 laws.

B. Special taxes were imposed upon Appellant for 1974 under Laws 1965, Chap. 735, to provide a means of payment of principal and interest on bonds issued by Independent School District No. 91 to finance the rehabilitation and construction of school facilities in Hoyt Lakes, Minnesota. Such special taxes are included as "a specific tax for school and other governmental purposes" within Minnesota Statute 298.03(6) and are thus deductible in computing the 1974 occupation tax which would be paid by Appellant as computed under the laws existing in 1963, which 1963 laws included Minnesota Statute 298.03(6).

C. Appellant is entitled to a deduction for production taxes paid under Minnesota Statute 298.24 at the rate of 11.5 cents per ton escalated for the described purpose applicable in 1974 under Minnesota Statute 298.03(6).

D. Consistent with earlier Findings, the production tax payable in 1974 under Minnesota Statute 298.241 is deductible under Minnesota Statute 298.03(6) which existed in essentially the same form in 1963 and 1974.

50. The Court finds Section 10 and 12 of Article VII, Chap. 607, Laws of Minnesota for 1980, have no probative value. Legislative history reveals that they were erroneously represented to the legislature as reflecting only a "technical change". The legislative history also reflects that they were introduced and adopted for the specific purpose of influencing this Court's determination of issues raised by appeals filed in 1975. The intent of the 1963 Legislature and the People in 1964 is not properly perceived by the 1980 Legislature. The record does not contain any facts supporting the reasonableness of the classification utilized.

51. The attached Memorandum is made a part of these Findings.

CONCLUSIONS OF LAW

1. In computing Erie's occupation tax liability for the calendar year ended December 1, 1974, under the laws applicable in that year, the Commissioner's disallowance of a deduction for taconite production taxes imposed and paid by Erie under Minnesota Statutes, Section 298.241, was in error. The production tax imposed under that section is deductible under Minnesota Statutes, Section 298.03(6). Erie incurred, for the calendar year ending December 31, 1974, production tax liability under Minnesota Statutes, Section 298.241, in the amount of $1,383,964. Accordingly, the Amended Findings and Order dated April 19, 1977, under which Erie's occupation tax liability for the calendar year ending December 31, 1974, had been redetermined, shall be adjusted by decreasing the taxable value of the ore produced by Erie as previously determined by the Commissioner ($41,866,933) by the amount of $1,383,964, and by decreasing the total amount of tax after credits as previously determined by the Commissioner ($2,826,018) by the amount of $93,418. Erie's total occupation tax liability for the calendar year ended December 31, 1974, under the laws applicable in that

year, but before application of the limitation, amounts specified in Minnesota Statutes, Section 298.40, Subd. 1, is $2,732,600.

2. The production tax imposed upon and paid by Erie for the calendar years ending December 31, 1971 through 1973, under Minnesota Statutes, Section 298.241, is also deductible under Minnesota Statutes, Section 298.03(6) in determining Erie's occupation tax liability for those years. Accordingly, the Commissioner shall adjust the taxable value of the ore produced by Erie in those years and its total occupation tax liability for those years in a manner similar to that set forth in the immediately preceding paragraph.

3. The issues placed before this Court for determination under paragraph 16(d) of the Stipulation of Facts (Exhibit 106) relative to the computation of the limitation amount under Clause (a) of Minnesota Statutes, Section 298.40, Subd. 1, are hereby resolved as follows:

A) In computing the limitation amount under Clause (a), Erie is to be allowed a deduction for interest on plant investment at the rate of six per cent per annum, the amount uniformly allowed by the Commissioner as of July 1, 1963. Accordingly, the deduction for the total cost of beneficiation, after the adjustment made in the Amended Findings and Order dated April 19, 1977, shall be increased from the $91,362,458 set forth in Item 18 of paragraph 16(c) of the said Stipulation of Facts, to $92,771,326.

B) In computing the limitation amount under Clause (a), Erie is to be allowed a deduction under Minnesota Statutes, Section 298.03(b), computing the taxable value of the ore produced, a deduction for taconite production taxes in the amount actually imposed upon and paid by Erie with respect to its 1974 operations, i.e., at the base

rate of 11.5 cents per ton adjusted for grade as escalated. Accordingly, Item 12 of paragraph 16(c) of the said Stipulation of Facts shall be increased in the amount of $1,147,626.

C) In computing the limitation amount under Clause (a), Erie is entitled to a deduction under Minnesota Statutes, Section 298.03(6) for special taxes actually imposed upon and paid by Erie for 1974 under Minnesota Laws 1965, Chapter 735, but not for taxes imposed upon and paid by Erie for 1963 under Minnesota Laws 1955, Chapters 429 and 540, Minnesota Laws 1959, Chapters 21 and 664. Accordingly, the amount deducted under Item 12 of paragraph 16(c) of the said Stipulation of Facts shall be increased by $61,980, and decreased by $896,618.

D) In computing the limitation amount under Clause (a), Erie is to be allowed a deduction under Minnesota Statutes, Section 298.03(6) in computing the taxable value of the ore a deduction for taxes imposed upon and paid by Erie for 1974, under Minnesota Statutes, Section 298.241. Accordingly, the amount deducted under Item 12 of paragraph 16(c) of the Stipulation shall be increased in the amount of $1,383,964, the amount of taxes paid by Erie for 1974 under Minnesota Statutes, Section 298.241.

4. The proper computation of the taxable value of the ore for the purpose of Clause (a), based upon the agreement among the parties as reflected in paragraph 16(a), (b) and (c) of the Stipulation and adjusted to reflect this Court's resolution of the issues specified in paragraph 16(d) of the said Stipulation, is shown below in a format corresponding with that of the occupation tax report filed by Appellant and the Final Determination. The figures reflect the adjustments made by the Amended Findings and Order dated April 19, 1977.

Tax Report Item:

7.	Net merchantable ore produced during the year	10,897,352 Tons	
4.	Lake Erie value of Item 7	Total Value	$243,593,210
	NON-STATUTORY DEDUCTIONS:	COSTS BEYOND MOUTH-OF-MINE.	
		Total Cost	
18.	Cost of beneficiation	$92,771,326	
	The $91,377,476 amount shown on the Final Determination is decreased by the $15,018 disallowed after audit by the Amended Findings and Order.		
15.	Transportation cost	$63,311,920	
16A.	Marketing expense	$ 542,143	
16B, C, D.	Misc.	$ 21,795	
	Total Non-Statutory Deductions		$156,647,184
	Value of Ore at Mouth-of-Mine		$ 86,946,026
	STATUTORY DEDUCTIONS:		
8.	Cost of Development	$10,982,720	
9A, B.	Cost of Mining Labor	$11,588,682	
9A, B.	Supplies	$11,264,239	
13.	Depreciation of mine plant and equipment	$ 3,368,543	
11.	Royalty	$ 7,423,054	
12.	Taxes under Minn. Stat. Sec. 298.24, Sec. 298.241, and Minnesota Laws 1965, Chapter 375	$ 2,994,687	
	Total Statutory Deductions		$ 47,871,925
	Taxable value of ore		$ 39,074,101

5. In accord with paragraph 16(e), the effective occupation tax rate for 1963 of 3.75 per cent is to be applied against the taxable value of the ore ($39,074,101) to arrive at a total occupation tax liability under Clause (a) of $1,465,279.

6. The parties have agreed in paragraph 17 of the Stipulation that the amount of royalty tax on royalties paid by Erie if such taxes were computed under the royalty tax laws in existence as of July 1, 1963, is $209,520.

7. Erie would have incurred, with respect to its 1974 operations, no sales and use tax liability, no employment excise tax liability, or no liability for any other excise tax under the laws in existence as of July 1, 1963.

8. Therefore, Erie's combined occupation, royalty and excise tax liabilities with respect to its 1974 operations if computed under the laws in existence as of July 1, 1963, for the purpose of Clause (a) is $1,674,799.

9. For the purpose of computing the hypothetical income and franchise tax which would be applicable to Erie for 1974 under Clause (b) of Minnesota Statutes, Section 298.40, Subd. 1, Erie's production of pellets is sold within the meaning of Minnesota Statutes, Section 290.17, Subd. 2(4), and it carries on its trade or business partly within and partly without the State within the meaning of that same provision.

10. For that same purpose, none of Erie's sales are made in this State within the meaning of Minnesota Statutes, Section 290.19, Subd. 1(1)(a), and subd. 1a.

11. Accordingly, no more than 30 per cent of Erie's net income is apportionable to Minnesota and subject to tax under the relevant provisions of Minnesota Statutes, Chapter 290 in computing the hypothetical income and franchise tax which would be applicable to Erie for the purpose of Clause (b).

12. The hypothetical income and franchise tax applicable to Erie under Clause (b) shall be computed in accordance with this paragraph.

A) In accordance with Clause (3) of Minnesota Statutes, Section 298.40, Subd. 1, the market value of the

taconite produced by Erie at the point where the beneficiation processes are completed shall be treated as Erie's gross receipts for the purpose of determining its gross income. Such market value shall be computed as follows:

1) Lake Erie value of ore (Item 4, Final Determination)	$243,593,210
2) Transportation expenses (Item 15, Final Determination)	(63,311,920)
3) Marketing expenses (Item 16A, Final Determination)	(542,143)
4) Miscellaneous expenses (Item 16B, C, and D, Final Determination)	(21,795)
5) Additional marketing and administrative expenses not allowable for occupation tax purposes as shown in Exhibit G	(551,376)
6) Market Value at point where beneficiation processes within this State are completed (gross receipts)	$179,165,976

B) Erie's net income shall be calculated as follows:

1) Gross receipts (from subparagraph (a))	$179,165,976
2) Labor for beneficiation (Item 18B, Revised Tentative Determination decreased by the $15,018 disallowed after audit by the Amended Findings and Order)	(27,025,935)
3) Supplies for beneficiation (Item 18C, Revised Tentative Determination)	(45,711,010)
4) Depreciation of beneficiation equipment (Item 18F9, Revised Tentative Determination)	(11,581,174)
5) Interest expense on beneficiation facilities (the balance of the $7,044,339 shown in Item 18G of the Revised Tentative Determination shall be disallowed)	(5,061,128)

6)	Cost of development (Item 8, Final Determination)	(10,982,720)
7)	Cost of mining supplies (Item 9B, Final Determination)	(11,588,682)
8)	Cost of mining supplies (Item 9B, Final Determination)	(11,264,239)
9)	Depreciation of mining equipment (Item 13, Final Determination)	(3,368,543)
10)	Royalties paid (Item 11, Final Determination)	(7,423,054)
11)	Taxes under Minn. Stat. Sec. 298.24 and Laws 165, c. 735	(1,860,723)
12)	Taxes under Minn. Stat. Sec. 298.241	(1,383,964)
13)	Net additional administrative expenses as shown in Exhibit H	(518,051)
14)	Ad valorem taxes as shown in Exhibit I	(204,031)
15)	Royalty taxes as shown in Exhibit J	(437,750)
	Net Income	$40,754,972

C) In accord with the Conclusions of Law set forth in paragraph 11 above, 30 per cent of this total net income of $40,754,972, or $12,226,492, shall be apportioned to Minnesota for the purpose of this calculation.

D) Pursuant to paragraph 17(c) of the Stipulation, there shall be deducted from this amount the sum of the $500.00 deduction available to all corporations and Minnesota charitable contributions in the amount of $3,140.00, or $3,640.00. The remainder after this subtraction is $12,222,852.

E) Against this amount is to be applied the corporate income tax rate of 12 per cent. The product of this computation is $1,466,742. This amount is Erie's hypothetical income and franchise tax liability under Clause (b).

13. To arrive at the total limitation amount applicable to Erie for 1974 under Clause (b), there must be added Erie's sales and use tax liability for 1974 of $696,511, and Erie's employment excise tax liability for 1974 in the

amount of $70,627. The sum of this computation is $2,233,880. This is the total limitation amount applicable to Erie under Clause (b).

14. The limitation amount under Clause (b), $2,233,880, exceeds the applicable limitation amount under Clause (a), $1,674,799 (see paragraph 8 of these Conclusions, supra), therefore, it is the limitation amount under Clause (b) which must be compared with Erie's liability under the occupation, royalty and excise tax laws applicable with respect to its 1974 operations.

15. Erie's combined liability under the occupation, royalty and excise laws applicable for 1974 is $3,876,874, consisting of an occupation tax liability of $2,732,600 (see paragraph 1 of these Conclusions, infra), a royalty tax liability of $377,136, a sales and use tax liability of $696,511, and an employment excise tax liability of $70,627.

16. Therefore, the combined occupation, royalty and excise tax liabilities paid by Erie for 1974 exceeds the limitation amount under Clause (b) by the sum of $1,642,994.

17. Sections 10 and 12, Article VII, Chapter 607, Laws of Minnesota for 1980, codified as Minnesota Statutes, Section 298.401 is an attempt by the legislature to interfere with the judicial process. If this Court were to give effect to that act, it would effectively destroy the opportunity to realistically compare taxes imposed on a taconite cost company with taxes imposed on a non-mining Minnesota corporation as contemplated by Minnesota Statutes Section 298.40, subd. 1(b), and the Taconite Amendment. The effect of that law would be to deny apportionment to taconite costs companies and to permit apportionment to other corporations.

18. Erie is entitled to a refund with interest, or at Erie's election, a credit with interest against future taxes, of the following amounts: (1) the sum of $1,642,994,

the amount by which the combined occupation, royalty and excise tax liabilities paid by Erie for 1974 exceeds the limitation amount under Clause (b), (2) the sum of $93,418, which represents the additional amount of occupation tax paid by Erie for 1974 because of the failure of the Commissioner to allow a deduction for the taxes imposed for that year under Minnesota Statutes, Sec. 298.241, and (3) whatever sums which result from the adjustment of Erie's occupation tax liabilities for 1971-1973 as required in paragraph 2 of these Conclusions because of the Commissioner's failure to allow this same deduction in those years.

LET JUDGMENT BE ENTERED ACCORDINGLY. A STAY OF 30 DAYS IS HEREBY ORDERED.

By the Court,

/s/ John Knapp
JOHN KNAPP
Chief Judge
Minnesota Tax Court

[SEAL]

EARL B. GUSTAFSON, Court Administrator of the Tax Court, State of Minnesota, does hereby certify that the attached instrument is a true and correct copy of the original on file and of record in my office.

Dated this 25th day of Nov. 1981
Eloise J. Erickson
Docket No. 2193, 2228, & 2430

MEMORANDUM

This matter is before the Tax Court by virtue of the appeal of Erie Mining Company (hereinafter referred to as "Erie") from the final determination of the Commissioner of Revenue (hereinafter referred to as the "Commissioner") of the occupation tax liability of Erie under Minnesota Statutes, Chapter 298, for the calendar year ended December 31, 1974, with respect to its Minnesota taconite mining operations (Docket No. 2193). Erie objects to the final determination of the Commissioner as to its 1974 occupation tax liability essentially on two general bases: First, Erie contends that the Commissioner in computing the taxable value of the ore produced by Erie in 1974 erred in not permitting Erie a deduction for the amount of production tax paid by it with respect to its operations for 1974 under Minnesota Statutes, Sec. 298.241. Erie claims it is entitled to this deduction under Minnesota Statutes, Sec. 298.03, subd. 6. Second, Erie contends that the magnitude of the occupation tax for 1974 as finally determined by the Commissioner exceeds the amount permitted under Minnesota Statutes, Sec. 298.40, subd. 1, and Article X, Sec. 6, of the Minnesota Constitution, the so-called "Taconite Amendment."

In addition, Erie is appealing from the redeterminations of the Commissioner made pursuant to Minnesota Statutes, Sec. 298.09, subd. 4, of its occupation tax liability for the calendar years ended December 31, 1971-1973 (Docket Nos. 2228 and 2430). Erie objects to these redeterminations on the sole ground that they improperly deprive Erie of a deduction under Minnesota Statutes, Sec. 298.03(6) for the production taxes paid under Minnesota Statutes, Sec. 298.241, which deduction had been previously granted for those years.

The combined occupation, royalty and excise taxes required to be paid with respect to mining, producing or beneficiating taconite are subject to a maximum limitation set out in Section 298.40. It reads as follows:

Minn. Stat. 298.40 TACONITE AND SEMI-TACONITE, LIMITATIONS ON TAXATION. Subdivision 1. The combined occupation, royalty, and excise taxes imposed upon or required to be paid with respect to the mining, production, or beneficiation of taconite or semi-taconite by any person or corporation engaged in such mining, production, or beneficiation, shall not be increased so as to exceed the greater of (a) the amount which would be payable if such taxes were computed under the laws in existence as of July 1, 1963, or (b) the amount which would be payable if such person or corporation were taxed with respect to such mining, production, or beneficiation under the income, franchise, and excise tax laws generally applicable to manufacturing corporations transacting business within the state, as such laws may be enacted or amended from time to time, except that for the purpose of the computation under this clause (b), (1) income shall be apportioned to Minnesota in the manner which may be otherwise specified by law; (2) operating losses shall be carried forward from one taxable year to another only to the extent which may be otherwise permitted by law; and (3) the market value of the taconite or semi-taconite, or the beneficiated product thereof, at the point where the beneficiation processes within this state are completed may be treated by law as gross receipts for the purpose of determining gross income from the business of mining, producing, or beneficiating taconite or semi-taconite, provided that if such market value is so used, to the extent that federal income taxes are deductible in computing taxes of manufacturing corporations generally, deductions shall be computed and allowed as if such taxes had been computed, assessed, and paid under the federal income tax laws with the market value of the taconite or semi-taconite or the beneficiated product thereof constituting the gross receipts for the purpose of determining gross income from the

business of mining, producing, or beneficiating taconite or semi-taconite.

Subd. 2. Taxes imposed upon the mining or quarrying of taconite or semi-taconite and upon the production of iron ore concentrates therefrom, which are in lieu of a tax on real or personal property, shall not be considered to be occupation, royalty, or excise taxes within the meaning of this section.

Subd. 3. For the purpose of this section "taconite" and "semi-taconite" shall have the meaning given to them by laws in existence at the time of the adoption of this section.

Article X, Section 6 of the Minnesota Constitution (commonly called the Taconite Amendment) prohibits the repeal or amendment of Section 298.40 and invalidates any conflicting laws until 1989. It reads as follows:

Sec. 6. Taconite taxation. Laws of Minnesota 1963, Chapter 81, relating to the taxation of taconite and semi-taconite, and facilities for the mining, production and beneficiation thereof shall not be repealed, modified or amended, nor shall any laws in conflict therewith be valid until November 4, 1989. Laws may be enacted fixing or limiting for a period not extending beyond the year 1990, the tax to be imposed on persons engaged in (1) the mining, production or beneficiation of copper, (2) the mining, production or beneficiation of copper-nickel, or (3) the mining, production or beneficiation of nickel. Taxes imposed on the mining or quarrying of taconite or semi-taconite and on the production of iron ore concentrates therefrom, which are in lieu of a tax on real or personal property, shall not be considered to be occupation, royalty, or excise taxes within the meaning of this amendment.

Essentially Section 298.40 provides that the occupation, royalty and excise tax imposed on Erie shall not exceed the greater of the following:

a) the amount Erie would pay if its taxes were computed under the laws as they existed July 1, 1963.

b) the amount Erie would pay if Erie were taxed under the income, franchise and excise tax laws generally applicable to manufacturing corporations transacting business within Minnesota, with specified differences.

Erie contends that the amount of occupation, royalty and excise tax paid by it in 1974 exceeds the permissible limit set out in Section 298.40. The Commissioner submits that the taxes do not exceed the "hypothetical income tax" limitation set out in that section. Because all of the other issues and questions regarding the limitation arise only if the Commissioner is reversed on this point, this question is of primary significance.

It is clear that a state can enter into a binding, valid and enforceable contract which grants tax exemptions or places express limitations on its power to tax. *Stearns v. State of Minnesota*, 179 U.S. 223; *Winona and St. Peter R Company v. City of Marshall*, 151 Minn. 331, 186 N.W. 791. The statute or a constitutional provision creates a contract between the state and the taxpayer where the language and circumstances show an intent to create private rights of a contractual nature which are enforceable against the state. See, *Sylvestre v. State*, 298 Minn. 142, 214 N.W. 2d 658.

It is clear from the evidence that all of the elements of a valid enforceable contract exist between Erie and the people of this state according to the terms of Article V, Section 6 of the Minnesota Constitution and Minnesota Statutes, Section 298.40. It is clear that the state intended to enter into a contract. Not only was the purpose

of the Taconite Amendment to enduce the development of the taconite industry in Minnesota and to encourage additional investment in that industry, but in addition, the word "contract" was repeatedly used by the persons who framed, supported and expressed the purpose and effect of the Taconite Amendment. Thus, the state not only attempted to induce additional development of the taconite industry for the economic welfare of northern Minnesota, but also intended that the taconite producers rely on its expressed policy of limiting the level of occupation taxes payable to that which would be payable if the producers were taxed as a manufacturing corporation.

It is very obvious that the intent and purpose of the Taconite Amendment was to make it more attractive for the iron mining industry to invest in plant and equipment in the State of Minnesota by giving the industry an assurance more binding than a mere statute. In laymen's language the Taconite Amendment provides that for a period of 25 years the taconite industry would receive the tax treatment then in existence, or at least not more severe than that treatment accorded other corporations within the state. Given the history of the state's treatment of the iron mining industry in the past, such an assurance by the state was a legitimate concern. Now that the industry has invested in plant and equipment in Minnesota the state has a contractual obligation to abide by the agreement. That part is conceded by the Appellee.

In *Reserve Mining Company v. State of Minnesota*, 210 N.W. 2d 487, the Minnesota Supreme Court held that the Taconite Amendment to the State Constitution constituted a contract between taconite mining companies and the state. In that case the Court said:

> ". . . In a basic contract analysis, the Amendment meets the criteria necessary to create a viable contract. The passage of the bill and approval by the citizens of Minnesota constituted the offer. The ac-

> ceptance was the action of Reserve to build facilities, create jobs and continue the production of taconite. Consideration existed on both sides: the state received revenues, a stronger economy and jobs for its citizens, while Reserve received a favorable tax status. Both sides have performed to date. When the people of this state make a bargain, mining companies as well as the least of us have a right to expect that the bargain will be kept. We affirm the trial court's finding that the Taconite Amendment is a contract between Reserve and the State of Minnesota."

The 1980 Minnesota Legislature enacted a law which purports to be a "restatement of the intent of Minnesota Statutes, Section 298.40, as originally enacted." The Commissioner contends that this legislation merely "construes and clarifies Section 298.40" and is entitled to "great weight in statutory construction" and should be recognized and given effect by this Court. The timing and circumstances under which this law was enacted, its legislative history, and the substance of the statute itself, preclude the Court from giving any prohibitive value in determining the issues presented in this appeal. It is practically, logically and legally impermissible for the 1980 Legislature to state the intent of the 1963 Legislature and the intent of the people of Minnesota in adopting the Taconite Amendment in 1964. The Act violates the doctrine of separation of powers provided by Article III of the Minnesota Constitution in two respects. It seeks to strip the Court of the judicial function of construing the 1963 legislation and the 1964 Constitutional Amendment and also seeks to compel the Court to decide in a specific way a contested matter properly within the Court's jurisdiction.

Long ago the Minnesota Supreme Court stated:

> "It is only the intent of the legislature which enacts a statute that is to govern courts in the construction thereof. The opinion of a subsequent legislature on

> a meaning of a statute is entitled to no more weight than that of the same men in their private capacity." *Bingham v. Board of Supervisors of Winona County*, 8 Minn. 441, 448.

In *Mayer v. Berlandi*, 39 Minn. 438, 446, the Minnesota Supreme Court said:

> "This is a clear invasion of the functions of the judiciary. The legislature enacts the laws, but it belongs to the courts alone to construe them."

It is now incumbent on this Court to determine what the agreement was when the Taconite Amendment was adopted by the people of the State of Minnesota. This Court cannot look to any statutes enacted by the legislature since the adoption of the Taconite Amendment, for help in determining its intent and purpose, but must make that decision from the statutes then in existence. It is conceded than an agreement was entered into between the State of Minnesota and the iron mining industry, but there is disagreement about the terms of that agreement.

This Court will not concern itself with whether or not the Taconite Amendment was favorable to the iron mining industry or favorable to the State of Minnesota. That is a concern which must be addressed by the legislature at the end of the 25 year period of the agreement.

The issues to be resolved by the Court relative to the proper determination of the limitation amount specified in Clause (a) of Minnesota Statutes, Section 298.40, subd. 1 (i.e., the amount of occupation, royalty and excise taxes which would be payable by Erie with respect to its 1974 operations if computed under the laws in existence as of July 1, 1963), are as follows:

1. Whether for the purpose of this Clause (a) there should be allowed for occupation tax purposes, as Erie contends, a non-statutory deduction for interest on beneficiating plant computed at the rate

of 6% per annum, the amount allowed informally to all taconite producers at the time of the original enactment of Minnesota Statutes, Section 298.40, subd. 1 and the adoption of the Taconite Amendment or whether this deduction should be computed, as the Commissioner contends, in accordance with the provisions of Minnesota Laws 1974, Chapter 556, Section 27, i.e., at the rate of 4%.

2. Whether for the purpose of computing the limitation amount under said Clause (a) there should be allowed for occupation tax purposes, as Erie contends, a statutory deduction under Minnesota Statutes, Sec. 298.03(6), for the tax actually paid by it in 1974 under Minnesota Laws 1965, Chapter 735, or whether, as the Commissioner contends, such tax is not deductible, but deductible instead are the taxes which were actually paid by Erie in 1963 under Minnesota Laws 1955, Chapters 429 and 540, Minnesota Laws 1957, Chapters 628, 776 and 858, and Minnesota Laws 1959, Chapters 21 and 664.

3. Whether for the purpose of computing the limitation amount under said Clause (a) there should be allowed for occupation tax purposes, as Erie contends, a statutory deduction under Minnesota Statutes, Sec. 298.03(6), for taconite production taxes imposed under Minnesota Statutes, Sec. 298.24, at the base rate of 11.5 cents per ton adjusted for grade as escalated, the rate applicable and actually paid by Erie with respect to its 1974 operations, or whether such deduction should be allowed, as the Commissioner contends, at the base rate of 5 cents per ton adjusted for grade as escalated, the rate on existence as of July 1, 1963.

4. Whether for the purpose of computing the limitation amount under said Clause (a) there should be allowed for occupation tax purposes, as Erie con-

tends, a statutory deduction under Minnesota Statutes, Sec. 298.03(6), for the tax paid by it for 1974 under Minnesota Statutes, Sec. 298.241, or whether, as the Commissioner contends, such tax is not deductible.

Clause (a) of Minnesota Statutes, Section 298.40, subd. 1 provides that the combined occupation, royalty and excise taxes imposed in any given year upon a person or corporation engaged in the production of taconite cannot exceed "the amount which would be payable if such taxes were computed under the laws in existence as of July 1, 1963." This limitation becomes applicable only if it is greater than the amount which would be payable under Clause (b) of said section, that is, the amount which would be payable by such a taconite producer if taxed under the income, franchise and excise tax laws applicable to manufacturing corporations generally transacting business within the state.

The Commissioner is in error in his contention that the production taxes paid by Erie with respect to its operations for the years 1971 through 1974 under Minnesota Statutes, Section 298.241, are not properly deductible in arriving at the taxable value of ore for the purpose of determining Erie's occupation tax liability in those years. The additional amount of tax imposed by Minnesota Statutes Section 298.241 is in nature no different from the amount of tax imposed under Minnesota Statutes, Section 298.24. The additional amount of production tax imposed under Section 298.241, like the amount of production tax imposed under Section 298.24, is levied on the basis of a specific amount per ton of merchantable iron ore concentrate produced. The subject of the taxes imposed under both sections is defined in an identical manner, the taxes in each case being "imposed upon taconite and iron sulphides, and upon the mining and quarrying thereof, and upon the iron ore concentrates produced therefrom, and upon the concentrate so produced. . . ." The escalation

formula is the same in each. The production taxes imposed under both sections are in addition to the occupation tax, the royalty tax and the taconite railroad tax. The taxes under both sections are in lieu of all other taxes upon taconite lands currently being used for production, and upon the machinery, etc., used in mining or concentration. The Court finds that the taxes imposed under both statutes are of precisely the same substance and must be deducted in determining the occupation tax liability for those years.

In *Reserve Mining Co. v. State of Minnesota*, supra, the Minnesota Supreme Court held that a tailings tax was an excise tax subject to the tax limitations of the Taconite Amendment because the tailings tax functions as an excise tax. In that case the Court said:

> "Though the legislature characterized the taconite tailings tax as an 'in lieu' tax, we must look beyond the form of the tax to its substance. To be exempt from the limitations on taxation imposed by Minn. Stat. Section 298.40, subd. 1, the Taconite Amendment, the tailings tax must be a valid substitute for a tax on real or personal property. . ."

In the instant case, the Respondents contend that the tax imposed by Minn. Stat. Section 298.241 is not a production tax because the legislature chose not to call it by that name. We find, however, that the tax is imposed in exactly the same manner as the production tax under Minn. Stat. Section 298.24. This Court will, therefore, also look beyond the form of the tax to its substance and determine that it is a production tax.

Immediately after the legislature's enactment of Minnesota Statutes Section 298.241, and immediately after the Commissioner and other members of his staff had participated directly in the legislative process which produced this enactment, the Department of Revenue adopted a practice of allowing a deduction for taxes paid under Section 298.241, as a deduction in computing the taxable

value of ore for occupation tax purposes under the authority of Section 298.03(6). This practice was continued for three years, 1971, 1972 and 1973. Later the Commissioner reversed this practice and denied the deduction not only for 1974, but also retroactively for the prior three years. The interpretation of the statute by the Department of Revenue made contemporaneously with the adoption of Section 298.241 is persuasive evidence of the legislature's intent that the taxes payable under that section were to be deductible. This is particularly true because occupation tax is not a self-assessed tax. It is computed by the Department of Revenue after the taxpayer files an occupation tax report. The Commissioner's argument to the effect that it was a mistake is not very valid because the Commissioner himself signed the final certifications of occupation tax due with respect to Erie and the other taconite producers for the years herein issue.

The Commissioner contends that the re-enactment rule of statutory construction should not be applied in the instant case for several reasons. The Commissioner's argument to the effect that the re-enactment rule cannot apply to the instant case because of the shortness of duration between the adoption of the departmental policy and the time of the re-enactment is not persuasive. Neither is the argument to the effect that the legislature was not aware of the department's policy relative to the deductibility of the tax imposed prior to its re-enactment of the statute, because in 1974 the legislature did amend Paragraph (7) of that section.

The Commissioner is in error in his contention that in computing the limitation amount under Clause (a) of Minnesota Statutes Section 298.40, subd. 1, Erie is not entitled to a deduction for interest on plant investment at the rate of 6%. It is not contested that for at least a decade prior to the enactment of Section 298.40, subd. 1, and the adoption of the Taconite Amendment, and continuing thereafter until July 1, 1974, the effective date of Chapter 556, Laws

of Minnesota 1974, the Commissioner allowed uniformly to every taconite producer a non-statutory deduction for interest on plant investment at the flat rate of 6% in computing the mouth-of-the-mine value for ore for occupation tax purposes. As of July 1, 1963, undeniably it was the Commissioner's unvarying practice to allow this deduction at that rate. Now the Commissioner contends that this deduction should be computed under the standard established by the legislature for this deduction the full eleven years after July 1, 1963. The Commissioner's view violates not only the expressed language of Clause (a), but also the very spirit and intent of the Taconite Amendment.

While the deduction is denominated as interest, it appears to the Court that the historic reason for the 6% interest allowance on capital investment was not really for the purpose of making an allowance of the actual interest expense, but was a recognition that some return on capital investment must be allowed in order to arrive at the mouth-of-the-mine value of the iron ore. This theory seems to be recognized even by the amended statute which sets the minimum amount at 4%. It is common knowledge that the expected return on investment did not decline between July 1, 1963, and July 1, 1974, so the Commissioner's argument to the effect that the new rate is more accurate than the old rate has no validity.

The Commissioner does not contend that the standards established under the relevant statutory provisions as they existed as of July 1, 1963, for the purpose of deducting certain costs from the mouth-of-the-mine value of ore to arrive at the taxable value of ore may in any way be modified for the purpose of computing the limitation amount under said Clause (a). By the same token, it logically follows that the standards established by the Commissioner as they existed as of July 1, 1963, for the purpose of deducting certain costs from the Lake Erie value to arrive at the mouth-of-the-mine value may similarly not be altered for the purpose of computing this same limitation amount.

Erie does not contend and this Court does not find that such deductions, statutory or non-statutory, must be in the specific amounts which would have been available to Erie in 1963 if it would have mined the same number of tons of ore in that year.

As we see it, Clause (a) does not mean that the deductions in 1974 and subsequent years would be the same as they were in 1963, but the standards must be the same. The standards in existence as of July 1, 1963, for computing the relevant deductions, statutory as well as non-statutory, must be applied if said Clause (a) is to be applied and accord not only with its spirit and intent, but also with its express language. As of July 1, 1963, certain non-statutory deductions, such as those pertaining to labor and supplies, were allowed in the amount of the actual expense incurred. This standard still applies in 1974 and subsequent years.

All of the regulations and interpretations in effect on the date of the adoption of the Taconite Amendment are to be given full effect. If additional production taxes were paid pursuant to Minnesota Statutes Section 298.241, proper credit must be given in computing the limitation amount under Clause (a) for the tax actually paid by it in 1974 under Minnesota Laws 1965, Chapter 735.

For the purpose of computing the limitation amount under Clause (a), there must be allowed for occupation tax purposes a statutory deduction under Minnesota Statutes Section 298.03(6) for taconite production taxes imposed under Minnesota Statutes Section 298.24, at the base rate of 11.5 cents per ton adjusted for grade as escalated, the rate applicable and actually paid by Erie with respect to its 1974 operations.

With respect to the computation of the limitation amount under Clause (b) of Minnesota Statutes, Section 298.40, subd. 1, the single issue is to be determined by this Court. That issue relates to the proper application of the apportionment formula as contained in Minnesota Stat-

utes, Section 290.19, subd. 1(1), in determining Erie's tax liability if computed under the 1974 income and franchise tax laws applicable to ordinary manufacturing corporation Erie contends that for such purpose only 30% of its net income is apportionable to Minnesota. The Commissioner, on the other hand, contends that 100% of such net income is apportionable to Minnesota, or in other words that Erie is not entitled to any apportionment whatsoever.

The Commissioner is in error in his contention that 100% of Erie's net income is properly apportionable to Minnesota in computing the hypothetical income and franchise tax to which Erie would be subject for 1974 under Clause (b) of Minnesota Statutes Section 298.40, subd. 1.

Erie contends that it carries on its business within and without the State of Minnesota within the meaning of Section 290.17, subd. 2(4). It contends that all of its sales are made outside of the state within the meaning of Clause (a) of Section 290.19, subd. 1(1), if properly construed in conjunction with the tests set forth in Section 290.19, subd. 1a.

The Commissioner contends that Erie's trade or business for the purpose of the hypothetical computation is by definition conducted "wholly within this state" within the meaning of Section 290.17, subd. 2(3), and that Erie, as a result, is entitled to no apportionment. In coming to his conclusion, the Commissioner ignores the specific statutory tests set forth in Minnesota Statutes Section 290.17, subd. 2(4), and Section 290.19, subd. 1a which tests were devised and inserted into the statutes expressly for the purpose of determining questions of the type herein issue, i.e. whether a business under the circumstances of any given case is to be deemed to be carried on partly within and partly without the state so as to be entitled to apportionment.

The Commissioner contends that because all of Erie's mining, production and beneficiation takes place within

Minnesota, Erie conducts its activities wholly within Minnesota. This Court, however, sees no basis for that conclusion particularly in view of the fact that Clause (b) of Section 298.40 reads in pertinent part as follows:

> "Income shall be apportioned to Minnesota in the manner which may be otherwise specified by law. . . ."

The use of the word "shall" in connection with the language "income shall be apportioned" indicates unequivocally that the principles of apportionment are to apply for the purpose of computing the limitation amount under Clause (b), irrespective of the other language of Minnesota Statutes Section 298.40, seized upon by the Commissioner as indicating to the contrary.

Minnesota Statutes Section 298.17, subd. 2(4) provides that "a trade or business located in Minnesota is carried on partly within and partly without this state if tangible personal property is sold by such trade or business and delivered or shipped to a purchaser located outside the State of Minnesota."

The legislative history of the 1973 amendment established clearly the intent of the legislature that even companies which carry on their business activities totally within the State of Minnesota may be entitled to apportionment under the current apportionment of income provisions contained in Chapter 290.

The explicit language of Clause (b) to the effect that "income shall be apportioned" specifies unequivocally that the principles of apportionment are to be applied for the purpose of determining that limitation amount.

The legislative history surrounding the original enactment of Minnesota Statutes Section 298.40, and the adoption of the Taconite Amendment, establishes that Clause (b) was inserted as one of the limitation amounts to insure that the liability of a taconite producer under the occupation, royalty and excise taxes normally applicable to

such producers would not result in a burden comparatively any greater than that borne by manufacturing corporations generally under the income, franchise and excise tax laws applicable to such corporations. It was recognized that if this intent were to be realized, some special provision would have to be made to facilitate the computation of this limitation amount in the case of taconite producers organized as cost companies. At the time of the enactment of Section 298.40 and the adoption of the Taconite Amendment, the only taconite producers in existence in the state were Erie and Reserve Mining Company, both of which were cost companies.

It is evident that the legislature in constructing the language of Section 298.40, as above quoted, had nothing in mind relating to apportionment, but rather had as its sole purpose the fashioning of a solution to the problem arising solely by virtue of the unique nature of the cost company. The legislature recognized that if the normal method of determining gross receipts were followed in the case of Erie and the other cost companies for the purpose of determining the hypothetical income tax which would be applicable to them under Clause (b), the result would be that ordinarily such cost companies would have only a nominal limitation amount applicable under Clause (b). Therefore, the only limitation which would be applicable to such companies would be the hypothetical amount under Clause (a) of Section 298.40, subd. 1. This at the outset would run contrary to the fundamental concept thought to be achieved by Section 298.40, subd. 1 and the Taconite Amendment. That concept was that the occupation, royalty and excise taxes of a given taconite producer was not in any sense to be considered frozen, but only that the combined amount of those taxes could not be raised so as to exceed the income, franchise and excise taxes applicable to ordinary manufacturing corporations, as those taxes were increased from time to time. The Appellant does not contend and this Court does not hold that Clause (a) or Clause

(b) froze the amount of taxes to be paid by taconite producers.

If the mouth-of-the-mine value were used to calculate the hypothetical income tax for the purpose of calculating the limitation under Clause (b), the income would be completely distorted because taconite ore is not a marketable product until after beneficiation has taken place.

To remove this obvious distortion which could result in an unwarranted benefit to such cost companies to the disadvantage of taconite producers not organized as cost companies, the legislature provided that such gross receipts would be determined rather by reference to "the market value of the taconite or semi-taconite, or the beneficiated product thereof, at the point where the beneficiation process within this state are completed. . . ." It seems clear that the legislature chose this particular measure to be used in imputing gross receipts to the cost companies rather than, for example, the "mouth-of-the-mine" value which is used in connection with the imposition of the occupation tax on high grade ores because it is only after beneficiation has taken place that the manufacturing process with respect to taconite ore is completed and a saleable product in the form of pellets has resulted. The gross receipts of a manufacturing corporation received from the sale of its product, whether this product be taconite pellets in the case of taconite producers not organized as cost companies or any other tangible product in the case of other manufacturers, will not under ordinary circumstances differ substantially from the market value of its product at the point where the manufacturing process with respect to that product is completed and the product is available for sale in its final form. By employing this measure, therefore, the legislature insured that the starting point of the computation of the hypothetical income and franchise taxes of a cost company under Clause (b) of Section 298.40, subd. 1 would be comparable with the starting point of the computation of the

same hypothetical taxes under said Clause (b) for taconite producers not organized as cost companies, and comparable to the starting point of the computation of the actual income and franchise taxes of manufacturing corporations generally.

The Commissioner contends that the language in Clause (b) indicates that the hypothetical income tax is to relate to activities undertaken geographically only within the State of Minnesota, and that therefore taconite producers generally are not entitled to apportionment in computing the limitation amount under Clause (b). That argument is not sound because many other companies conduct their business wholly within the State of Minnesota and yet are entitled to an apportionment because all of their sales take place outside the State of Minnesota. It appears to this Court that when Clause (b) is read in its entirety apportionment is mandated.

The Commissioner argues further that the language of Minnesota Statutes Section 298.40, subd. 1(b)(3), which imputes to cost companies gross receipts measured by "the market value of the taconite . . . at the point where the beneficiation process within this state are completed . . ," indicates that such gross receipts are established without regard to sales. The Commissioner is in error in presuming that gross receipts can be imputed without sales. Where gross receipts are imputed to a cost company, a sale must be assumed or imputed because without a sale no income can be imputed or realized since it is clear that no manufacturer of tangible personal property can have gross receipts in excess of its costs of production without sales. Gross receipts must be deemed to have resulted from sales. In the instant case the only sale that could be assumed or imputed is a sale with a destination outside of the State of Minnesota because there are no smelting facilities within the state.

Taconite producers not operating as cost companies will ordinarily have their gross receipts determined in the nor-

mal fashion by specific reference to sales. If the question whether apportionment is to be permitted or not to be permitted is to be resolved by reference to the question of whether gross receipts are determined in any given case specifically by reference to sales, the obvious result would be that some taconite producers for the purpose of computing the limitation amount under Clause (b) would be entitled to apportionment while others would not. The discrimination which would result among the taconite producers themselves for the purpose of computing the said limitation amount could not have been intended by the legislature.

The legislative history relating to the adoption of the 1973 Amendments to the apportionment statutes makes it clear that the legislature intended by them to encourage local manufacturers exporting their product outside the State of Minnesota by affording to them the benefit of apportionment.

The essential concept sought to be achieved by the Taconite Amendment is that the occupation and royalty tax liabilities of a taconite producer in any given year are not to result in a burden comparatively greater than that borne by manufacturing corporations generally under the income, franchise and excise tax laws applicable to such corporations, as amended from time to time. If this limitation amount is to be in accord with the intent with which it was obviously adopted, the "hypothetical" income tax of a taconite produced under Clause (b) must be made on the same basis that the actual income taxes of manufacturing corporations generally are computed. This intent will not only be not realized, but will in effect be totally subverted, if at the outset an assumption is made that apportionment is not available by definition to taconite producers for the purpose of the computation under Clause (b), despite the fact that apportionment is available in computing the income taxes of manufacturing cor-

porations generally. The express language of the statute is otherwise.

The Commissioner is in error in his contention that Erie's sales cannot be considered as having been made outside this state for apportionment purposes in computing Erie's hypothetical income and franchise tax under Clause (b).

Under the 1973 Amendment, sales are to be assigned on a destination basis to the "consumer state" or the state in which the purchaser is located. The legislature expressed directed in Section 290.19, subd. 1a, that f.o.b. points and other conditions of sale, the very factors upon which the Commissioner is relying in making his argument, are to be expressly disregarded. F.o.b. points and other conditions of sale were not considered determinative even under the "origin" test which applied before the adoption of the 1973 Amendments.

Having given this matter grave consideration, the Court feels duty bound to find for the Appellant on all counts. Here we have an agreement that must be honored.

J.K.

APPENDIX D

TO BE VOTED ON AT THE
NOVEMBER 3, 1964, ELECTION

Two Proposed Amendments to the
Minnesota State Constitution Submitted
by the 1963 Legislature

AMENDMENT NO. 1—TAXATION OF
TACONITE AND OTHER METALS

AMENDMENT NO. 2—REMOVAL OF
OBSOLETE PROVISIONS FROM THE
STATE CONSTITUTION

WALTER F. MONDALE
Attorney General
State of Minnesota
St. Paul

July 6, 1964

HONORABLE JOSEPH L. DONOVAN
Secretary of State
CAPITOL

Dear Mr. Donovan:

Pursuant to Minnesota Statutes, Section 3.21, you are hereby furnished a statement of the purpose and effect of each of the following proposed amendments to the Constitution of the State of Minnesota. They are to be submitted to the voters for their approval or rejection at the November 3, 1964 general election, as directed by Laws 1963, Chapters 99 and 870.

AMENDMENT NO. 1—TAXATION OF TACONITE AND OTHER METALS

Amendment No. 1 does not amend any existing section of the Constitution but adds an entirely new article.

Amendment No. 1 would prevent, for a period of 25 years after the date of its adoption, any increase in the combined occupation, royalty, and excise taxes on mining, producing, or beneficiating taconite or semi-taconite, beyond the greater of

(1) the combined occupation, royalty, and excise taxes payable under the laws in effect on July 1, 1963; or

(2) the taxes which would be payable if taconite mining, production, or beneficiation were taxed under the income, excise and franchise tax laws generally applied to manufacturing corporations doing business in Minnesota, as these laws may from time to time be amended.

The amendment does not limit the legislature's power to levy or increase the so-called "production tax" or any other occupation, royalty, or excise tax which is, or may be, imposed in lieu of real or personal property taxes, nor its power to impose, increase, or decrease real or personal property taxes.

The amendment also empowers the legislature to enact binding limitations on the state's taxing powers with respect to taxes to be imposed upon the mining, production, or beneficiation of copper, copper-nickel, or nickel. Such limitations, if enacted, cannot last for more than 25 years, or in any event beyond the year 1990.

* * * *

Office-Supreme Court, U.S.
FILED
DEC 22 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-801

IN THE

Supreme Court of the United States

October Term, 1983

PICKANDS MATHER & CO., as Managing Agent for Erie Mining Co.,

Petitioner,

v.

COMMISSIONER OF REVENUE OF THE STATE OF MINNESOTA, and RANGE MUNICIPALITIES AND CIVIC ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

RESPONDENTS' BRIEF IN OPPOSITION

LAURENCE J. KLUN
P. O. Box 240
Ely, Minnesota 55731
Telephone: (218) 365-3221
Counsel for Respondent Range Municipalities and Civic Association

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
MICHAEL P. SULLIVAN*
DAVID C. BAHLS
Special Counsel
300 Roanoke Building
Minneapolis, Minnesota 55402
Telephone: (612) 343-2800
Counsel for Respondent Commissioner of Revenue

*Counsel of Record

1983—Northwest Brief Printing Co., 3010 2nd St. No., Minneapolis 55411—588-7506

QUESTIONS PRESENTED

1. Whether the limitation imposed by Minn. Stat. § 298.40 on the combined occupation, royalty, and excise taxes of taconite companies is unconstitutional under the Commerce Clause of the Constitution of the United States or the Due Process Clause of the Fourteenth Amendment.

2. Whether the Contract Clause of the United States Constitution is violated by the Minnesota Supreme Court's construction of Minn. Stat. § 298.40.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iv
Jurisdiction	1
Additional Relevant Constitutional and Statutory Provisions	2
Statement	2
Reasons for Denying the Writ	4
1. Due Process and Commerce Clauses	5
a. Neither the Decision Below Nor the Record Raises the Question Presented in this Petition	6
b. Section 298.40 Does Not Violate the Due Process or Commerce Clauses	8
c. There is no Substantial Federal Question	10
2. Contract Clause	11
a. Neither the Decision Below Nor the Record Raises the Contract Clause Question Presented in the Petition	12
b. The Petitioner's Constitutional Rights Were Not Violated By the Minnesota Supreme Court's Decision	13
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Bailey v. Anderson, 326 U.S. 203 (1945)	7
Cardinale v. Louisiana, 394 U.S. 437 (1969)	13

Cramp v. Board of Public Instruction, 368 U.S. 278 (1961) 6
Hortonville District Joint School District No. 1 v. Hortonville Education Association, 426 U.S. 482 (1976) 6
Illinois v. Gates, 103 S.Ct. 2317 (1983) 12
Keefe v. Clark, 322 U.S. 394 (1944) 13
Lynch v. New York ex rel. Pierson, 293 U.S. 52 (1934) 6-7
McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940) 8
Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1922) 5
Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 7
Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924) 11, 12, 15
United States v. Atkinson, 297 U.S. 157 (1936) 8
Webb v. Webb, 451 U.S. 493 (1981) 6

Statutory Provisions:

Minn. Stat. Ann. §298.01 (1983) 2, 3, 5
Minn. Stat. Ann. §298.40 (1972) 2, 3, 4, 5, 6, 7, 8, 9, 11, 14, 15

No. 83-801

IN THE

Supreme Court of the United States

October Term, 1983

PICKANDS MATHER & CO., as Managing Agent for Erie Mining Co.,

Petitioner,

v.

COMMISSIONER OF REVENUE OF THE STATE OF MINNESOTA, and RANGE MUNICIPALITIES AND CIVIC ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Commissioner of Revenue of the State of Minnesota and the Range Municipalities and Civic Association respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Minnesota Supreme Court's opinion in this case. That opinion is reported at 334 N.W.2d 155 (1983).

JURISDICTION

Petitioner states this Court has jurisdiction under 28 U.S.C. § 1257(3). As will be discussed fully in the reasons

for denying the Writ, this Court should not take jurisdiction since the questions were not raised in or decided by any court below.

ADDITIONAL RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 298.01, Subdivision 2, of Minn. Stat. (1983) provides, in part:

> Every person engaged in the business of producing or mining taconite, semi-taconite and iron sulfides in this state shall pay to the state an occupation tax equal to 15% of the valuation of all taconite, semi-taconite and iron sulfides mined or produced after December 31, 1970.

STATEMENT

Petitioner's STATEMENT requires clarification. Its heavy emphasis on the history of mining in the State of Minnesota and the genesis of the "Taconite Amendment", and its deficiency in describing the limitation imposed by Minn. Stat. §298.40 obscure the salient facts. They are not very complex. Simply stated, Minn. Stat. §298.01 imposes an occupation tax based upon the value of the taconite, semi-taconite and iron sulfides mined in Minnesota by Petitioner. Over forty years after this tax was adopted, Minn. Stat. §298.40 was enacted. It imposed limitations on the amount of a taconite company's occupation taxes. The limitation was stated in terms of the highest of two alternatives. The alternative limitation which is relevant in this matter provides that the occupation taxes payable shall be no greater than the taxes which would be payable

if the taxpayer were subject to a hypothetical income tax computed in accordance with special rules and exceptions laid out in Section 298.40. The "Taconite Amendment" merely states that Section 298.40 cannot be amended for 25 years.

The constitutionality of the occupation tax imposed by Section 298.01 is not at issue. Petitioner has not argued that a limitation such as that imposed by Section 298.40 is required to avoid a constitutional challenge of an occupation tax. If the limitation of Section 298.40 had not been adopted, there would be no issue before this Court.

The Petitioner is in effect asserting that because the State of Minnesota has chosen to place a limitation upon an occupation tax and that limitation is based upon a hypothetical income tax computation, the computation of the limitation must incorporate all of the income apportionment requirements imposed by the Constitution of the United States in respect to a state income tax. This would be required notwithstanding the fact that the Minnesota Supreme Court, in the proceedings below, found that there was a clear and explicit provision in Section 298.40 which precluded apportionment in this hypothetical income tax computation.

In summary, the occupation tax is based upon the value of the minerals mined by the taxpayer rather than upon income generated or any sales made. The determination of the limitation on the amount of occupation tax payable requires a computation of a hypothetical income tax which does not provide for apportionment of the hypothetical income.

REASONS FOR DENYING THE WRIT

The Petitioner asserts that the Petition for Writ of Certiorari should be granted so this Court can review two federal questions: 1) whether the limitation on the occupation tax violates the Due Process and Commerce Clauses, and (2) whether the Minnesota Supreme Court's decision violates the Contract Clause.

The Petition for Writ of Certiorari should be denied with respect to the first question. Specifically, this Court should not take jurisdiction to hear the question. The issue was not raised or decided by any court below as is required for this Court to take jurisdiction under 28 U.S.C. § 1257 (3). Moreover, Section 298.40 does not violate the Due Process or Commerce Clauses. While those clauses require apportionment of income for an actual state income tax, those clauses do not require apportionment in computing a tax limitation on an occupation tax even if the computation of the limitation is made in part by reference to certain income tax statutes.

The Petition for Writ of Certiorari also should be denied with respect to the second question. This Court should not take jurisdiction to hear the question. The record must establish that the question was decided by the state court before this Court should take jurisdiction under 28 U.S.C. § 1257(3). This question was never raised in or decided by any state court. Moreover, the Minnesota Supreme Court's decision does not violate the Contract Clause. The decision could not strip Erie of its contractual right to apportionment in computing the tax limitation under Section 298.40 since Erie never had the right to apportionment.

1. Due Process and Commerce Clauses.

The Petitioner states that the first question is whether the Commerce Clause of the Constitution of the United States and the Due Process Clause of the Fourteenth Amendment forbid the State of Minnesota from apportioning a mining company's income to itself. Three points of clarification need to be raised.

First, Section 298.40 does not impose an actual tax on income. Rather it imposes a limitation on the occupation tax. The limitation is computed by applying some, but not all, of the income tax statutes to imputed gross receipts of the company. It is simply a hypothetical computation, not an actual tax.

Second, Petitioner does not assert that the Due Process or Commerce Clauses require apportionment for the occupation tax itself. However, contrary to Petitioner's statement that the occupation tax is levied on the "interstate transfer of taconite" (Petition at 15), the occupation tax is a tax on certain mining companies which is "equal to 15% of the valuation of all taconite, semi-taconite and iron sulfates mined or produced. . . ." Minn. Stat. §298.01, Subdivision 2. The occupation tax is based solely on the value of ore mined, not on the interstate transfer of the taconite and not on any sales or income generated from such a transfer. This Court has determined that the Minnesota occupation tax is a tax on the local business of mining and does not violate the Commerce Clause. *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1922).

Third, it is important to note what is not at issue. The issue is not whether Section 298.40 permits apportionment. Nor is the issue whether Erie has sales for purposes of the apportionment formulae. The Minnesota Supreme

Court has already held that Section 298.40 does not provide for the application of the apportionment formulae in computing the limitation on the occupation tax regardless of whether Erie has any sales. The United States Supreme Court is bound by the Minnesota Supreme Court's interpretation of the Minnesota statute. *See Hortonville District Joint School District No. 1 v. Hortonville Education Association*, 426 U.S. 482, 488 (1976), *Cramp v. Board of Public Instruction*, 368 U.S. 278, 285 (1961).

Therefore, the only federal question is whether the fact that Section 298.40 does not provide for apportionment of imputed gross receipts in computing the limitation on the occupation tax renders Section 298.40 unconstitutional under the Due Process Clause or the Commerce Clause. The Respondents maintain that the limitation is constitutional. If the limitation is unconstitutional, however, as Petitioner claims, the limitation would be void but the tax itself would remain valid. Such a determination would provide Petitioner no relief.

a. Neither the Decision Below Nor the Record Raises the Question.

This Court should not take jurisdiction to hear this question. This Court should not take jurisdiction to review a decision of a state court pursuant to 28 U.S.C. §1257(3) unless each of the following requirements is fulfilled: (1) the federal issue of the validity of the statute is raised before the state court, (2) that federal issue is actually decided by the highest state court, and (3) the record before this Court establishes that the first two requirements are fulfilled. *Webb v. Webb*, 451 U.S. 493, 496-97 (1981), *Lynch v. New York ex rel.*

Pierson, 293 U.S. 52, 54 (1934). It is not sufficient to raise the issue in a petition for rehearing. *Bailey v. Anderson*, 326 U.S. 203, 206-207 (1945), *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945).

None of these requirements are met. The validity of Section 298.40 under the Due Process or Commerce Clauses was never drawn into question in any of the state court proceedings. The issue before the state courts was the construction of Section 298.40, not its validity. Since the Constitutional issue was not raised, the issue obviously was not decided by the Minnesota Supreme Court and, accordingly, the record before this Court makes no mention of this issue. Clearly, this Court should not take jurisdiction over this federal question.

Petitioner contends that the Due Process argument was raised before the Minnesota Tax Court. First, while the Due Process Clause was raised in Petitioner's Pretrial Brief before the Tax Court, the Clause was not raised in the context of challenging the constitutionality of Section 298.40. Second, even if the question were raised, this Court should not take jurisdiction since the question was not decided and since the record does not establish that the question was raised and decided.

Petitioner, apparently recognizing this defect in jurisdiction, submits that this Court nonetheless has jurisdiction since the Minnesota Supreme Court committed a plain error. The plain error doctrine, however, generally is limited to cases which the Court has already decided to review and the issue is whether the Court can review a federal question that was not presented in the petition for writ of certiorari. While this Court has, in rare circumstances, granted a petition for a writ of certiorari to

review a state case even though the federal question involved was not raised before the state court, Respondents submit that this case is not an appropriate one for this Court to exercise that discretion. This Court, in *United States v. Atkinson*, 297 U.S. 157 (1936), described the rare circumstances in which such discretionary jurisdiction should be exercised.

> In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if such errors are obvious, or if they otherwise severely affect the fairness, integrity or public reputation of judicial proceedings.

297 U.S. at 160. Furthermore, the Court should be particularly reluctant to grant a writ of certiorari in cases coming from a state court in which a state statute is being challenged as unconstitutional where the constitutional challenge was not raised in the state court. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). The plain error doctrine is generally applied only in criminal cases. This is a civil case involving the constitutionality of a state statute. There is no obvious error in the Minnesota Supreme Court's decision.

b. Section 298.04 Does Not Violate the Due Process or Commerce Clauses.

At issue is the constitutionality of a limitation placed on an occupation tax. Petitioner contends that the limitation violates the Due Process and Commerce Clauses since the limitation is computed without apportionment. As stated above, Petitioner does not contend the occupa-

tion tax itself violates the Due Process or Commerce Clauses even though apportionment is not permitted under the occupation tax. Rather, Petitioner contends that the *limitation* subsequently imposed on the occupation tax violates those Clauses.

Petitioner raises this question not because of the nature of either the limitation or the tax being limited, but because of the manner in which the limitation is computed. If the state had enacted a fixed limitation on the occupation tax, Petitioner presumably would not contend that the limitation violated the Due Process or Commerce Clauses since there would be nothing to apportion. The state, however, chose to enact a limitation the computation of which is in part determined by reference certain income tax statutes. The limitation is computed by applying those statutes to imputed gross receipts (as described in Section 298.40) regardless of the mining company's actual sales, receipts, or income. Petitioner is asserting that, since the state chose to enact a limitation which is computed with some reference to the income tax statutes, the limitation must fulfill all of the constitutional requirements of an income tax.

Petitioner cites cases which hold that the Due Process and Commerce Clauses impose a limitation on a state's authority to tax businesses operating in interstate commerce. Those cases hold that apportionment of income is required in actual state income taxes so as to limit the state's power to levy an income tax to economic activity within the taxing state's borders. Without this requirement, several states could tax the same income and a corporation doing business in more than one state could be subject to double taxation on that income. Hence, there

may be a burden on interstate commerce. Obviously, this result can occur only if a corporation is subject to an actual tax. Although all of the cases cited by Petitioner deal only with actual state taxes, Petitioner extrapolates from these cases that these constitutional restrictions also apply to a limitation on a tax if that limitation is computed in part by reference to state income tax statutes. Petitioner argues that, while the occupation tax without a limitation does not result in a burden on interstate commerce, the enactment of an upper limitation on the tax creates a burden on interstate commerce.

The fallacy of Petitioner's argument is clear. A limitation on a tax cannot result in double taxation. This is true whether the limitation is a fixed amount or whether it is computed by reference to certain state income tax statutes. Double taxation can result only from actual taxes. A tax limitation is unconstitutional under the Due Process or Commerce Clauses only to the extent its application to the underlying tax renders the underlying tax unconstitutional under these Clauses. Petitioner does not deny that the occupation tax, with or without the limitation, does not violate the Due Process or Commerce Clauses and does not create a burden on interstate commerce.

c. There is no Substantial Federal Question.

This Court also should not grant this Petition for Writ of Certiorari since any federal question involved is limited to this special situation in Minnesota. No federal statutes or cases were relevant to the decision of the Minnesota Supreme Court. There is no split of authority on the question. No other state has a similar statute so any decision will have no further application.

Moreover, the question is hypothetical. Erie's occupation tax liability is below the limitation. Therefore, Erie's tax liability is the same as it would be if the limitation had not been enacted. Consequently, striking down the limitation as unconstitutional will not affect Erie's tax liability as long as the underlying occupation tax, which is not challenged, remains operative. Further, striking down the limitation would provide Petitioner no relief.

2. Contract Clause.

The second federal question, as stated by the Petitioner, is whether this Court's decision in *Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924), should be modified to extend the application of the Contract Clause of the Federal Constitution to judicial actions. The *Tidal Oil Co.* case limited the Contract Clause to legislative acts.

The Petition for Writ of Certiorari should be denied with respect to this question. Since this is the first time the issue has been raised in these proceedings, this Court should not take jurisdiction to hear the question. Moreover, implicit in the question is the assumption that the decision by the Minnesota Supreme Court strips Erie of the contractual right to apportion imputed gross receipts in computing the limitation on the occupation tax under Section 298.40. Because that assumption is incorrect, the issue of whether *Tidal Oil Co.* should be modified does not even arise. Obviously, this is not an appropriate opportunity for the Court to review the *Tidal Oil Co.* decision.

a. Neither the Decision Below Nor the Record Raises the Contract Clause Question Presented in the Petition.

As stated above, the Supreme Court should take jurisdiction to review federal questions involved in state court decisions only if the record shows the question was actually presented to, and decided by, the state court. Petitioner acknowledges that this issue was not raised in any state court. (Petition at 12).

Petitioner states, however, that the issue could not have been raised since a state court could not have overruled the *Tidal Oil Co.* decision. Petitioner, without any discussion, assumes this creates an exception to the rule that all federal questions must be raised in the state court. The statute does not delineate any such exception. While the Minnesota Supreme Court cannot overrule a U.S. Supreme Court decision, the Contract Clause must still be raised before the state courts. In *Illinois v. Gates,* 103 S.Ct. 2317 (1983), this Court refused to consider whether the federal exclusionary rule should be modified since the issue had not been raised in the state courts. The reasons for requiring a Petitioner to raise a federal question before the state courts are not dependent upon the state courts' having the power to decide that particular question. As this Court has stated:

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in the federal system it is important that the state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves the constitutionality. Or the issue may be blocked by an adequate state ground.

Cardinale v. Louisiana, 394 U.S. 437, 439 (1969).

Since this issue was not brought up before the state court, the United States Supreme Court should not take jurisdiction to review this issue.

b. The Petitioner's Constitutional Rights Were Not Violated By the Minnesota Supreme Court's Decision.

The federal question, as presented by the Petitioner, of whether the Contract Clause is applicable to the Minnesota Supreme Court is moot since, even if the application of the Contract Clause were extended to action of the courts, the decision of the Minnesota Supreme Court below could not be held to violate the Contract Clause. In order for there to be a violation of the Contract Clause, each of the following requirements must be met: (1) the party must have a contractural right and (2) the action in question must deprive the party of that right. The first requirement must be fulfilled before the second requirement is even reached. As this Court stated in *Keefe v. Clark*, 322 U.S. 394, 396 (1944), "Before we can find impairment of a contract we must find an obligation of the contract which has been impaired." If the Petitioner never had the right to apportion its imputed gross receipts in determining the limitation on the occupation tax under Section 298.40, the first requirement would not be fulfilled and the action by the Minnesota Supreme Court could not violate any right of the Petitioner under the Contract Clause.

The Petitioner, in arguing that the Minnesota Supreme Court has deprived it of the right to apportionment in computing the limitation on the occupation tax under Section

298.40, assumes that Section 298.40 permits apportionment. However, whether Petitioner has, in the first instance, the right to apportionment turns on the interpretation of the language of the contract, which is the provisions of Section 298.40 which was frozen by the Taconite Amendment. After examining all relevant facts, the Minnesota Supreme Court, in the first case it was presented the issue, stated that "the legislature did not intend the apportionment formula generally applicable to manufacturing companies to be used [under §298.40]." (App. 11a). Contrary to the Petitioner's statement that the Minnesota Supreme Court did not deny that Section 298.40 and the Taconite Amendment were enacted to ensure complete parity of taxation between taconite and manufacturing companies (Petition at 21), the Minnesota Supreme Court specifically held that Section 298.40 and the Taconite Amendment were not enacted to create such parity.

> Erie argues that disallowing income apportionment . . . defeats the purpose of the Taconite Amendment to keep the occupation taxes of a taconite company on a parity with income taxes paid by other corporations. This begs the question . . . . The issue here, however, . . . is not [the] repeal, modification or amendment [of Section 298.40], but simply what the statute says. The fact is that section 298.40 does not say that taconite producers are to be taxed in the same manner as other manufacturing companies generally, but, rather, they are to be taxed in the same manner *except* that the income apportionment formula used by other manufacturing companies does not apply.

(App. 13a-14a) (Emphasis by Court).

The Minnesota Supreme Court has determined that Section 298.40 does not give Erie the right to apportionment.

A judicial interpretation of a contract does not deprive one party of its rights under that contract. To suggest any other conclusion would be to suggest that this Court open for review under the Contract Clause a state court's interpretation of a contract in each instance when that interpretation results in a party having fewer rights than the party asserted it had. Such result would provide a back door for this Court's review of all state contract cases.

Petitioner has failed to establish the prior existence of a right which the action of the Minnesota Supreme Court has taken from it. Since that requirement is not fulfilled, there can be no violation of the Contract Clause even if it were appropriate to expand the coverage to action of the courts.

CONCLUSION

This Court should not be sidetracked by Petitioner's characterization of the issues. The first question is not whether Section 298.40 permits apportionment of imputed gross receipts nor whether Erie has sales or mere transfers. The question is whether the limitation under Section 298.40 is unconstitutional. The second question is not whether the *Tidal Oil Co.* decision should be modified but whether the Minnesota Supreme Court's construction of Section 298.40 would have violated the Contract Clause even if the Contract Clause were applicable to judicial acts.

This Court should not take jurisdiction since neither question was raised in the state court. Even if there were not jurisdictional defects, however, both questions are clearly answered in the negative.

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
MICHAEL P. SULLIVAN*
DAVID C. BAHLS
Special Counsel
300 Roanoke Building
Minneapolis, Minnesota 55402
Telephone: (612) 343-2800
COUNSEL FOR RESPONDENT
COMMISSIONER OF REVENUE
LAURENCE J. KLUN
P.O. Box 240
Ely, MN 55731
Telephone: (218) 365-3221
COUNSEL FOR RESPONDENT
RANGE MUNICIPALITIES AND
CIVIC ASSOCIATION

*Counsel of Record